United States Court of Appeals

for the Second Circuit

APPENDIX

77-1150

B P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1150

UNITED STATES OF AMERICA,

Appellee,

—v.—

AMREP CORPORATION, RIO RANCHO ESTATES, INC., ATC REALTY CORPORATION, HOWARD W. FRIEDMAN, CHESTER CARITY, HENRY L. HOFFMAN, and DANIEL FRIEDMAN,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
MAY 9 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

JOINT APPENDIX OF UNITED STATES OF AMERICA AND ALL DEFENDANTS

Volume XV—Pages A-9237 to A-9608DD

UNITED STATES COURT OF APPEALS
FILED
MAY 9 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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U.S. DISTRICT COURT
FILED
OCT 21 1976
S. D. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
V.	:	S 76 Cr. 644 (CMM)
AMREP CORPORATION, et al.,	:	AFFIDAVIT ON RENEWED MOTION FOR SEVERANCE
Defendants.	:	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

LARRY M. LAVINSKY, being duly sworn, deposes and says:

1. I am a member of the firm of Proskauer Rose Goetz & Mendelsohn, attorneys for the corporate defendants and submit this affidavit in connection with defendant Solomon H. Friend's renewed motion for a severance.

2. We join in his renewed motion because we believe that a joint trial of Mr. Friend and his former client must inevitably prejudice either or both. The problems inherent in a joint trial of Amrep and Mr. Friend have become immediate and pressing in view of the Government's announced intention of reading portions of Mr. Friend's grand jury testimony as part of its affirmative case and the advice in Mr. Glendon's affidavit that he is going to use privileged material in his opening to the jury.

3. By separate affidavit and supplemental affidavit we have objected to the Government's proffer of Mr. Friend's grand jury testimony for a variety of reasons. We likewise object to Mr. Glendon's disclosure of privileged material in his opening to the jury.

4. Judge Duffy's opinion of October 15, 1975 permitting Mr. Friend to turn over certain privileged documents to the grand jury expressly noted "the continuing assertion by the corporation of its attorney-client privilege with respect to these documents". Indeed, at the argument before Judge Duffy, Ms. Hynes stated:

> "... the ramifications of producing these documents is really not before your Honor. It is not a ripe issue for litigation. If it comes up at a later time it should be litigated fully before the Court who has the issue before it." (Tr. p. 8, 11, 12-16)

Judge Duffy relied upon the Code of Professional Responsibility, Disciplinary Rule 4-101(C) as authority for the limited use of confidential material ordered by him. However, we know of no case which has interpreted the Rule as authorizing a breach of the attorney-client privilege at a joint criminal trial where both attorney and client are defendants and the former is seeking by use of the privileged material to exculpate himself at the expense of the latter.

5. In opposing the initial motions seeking a severance of Mr. Friend, Ms. Hynes took the position that by

the time privileged material is offered, the Government will have established a prima facie case that "Friend's communications with his client ... were in furtherance of the crimes committed by Friend and his co-defendants". (Government's Memorandum of Law in Opposition to Defendants' Non-Discovery Motions p. 122) In its opinion dated July 22, 1976 denying the original severance motions, the Court concluded that a joint trial would not pose serious privilege problems since privileged material would be offered only after the close of the Government's case. Presumably, by that time, the Government will either have established a prima facie case against Mr. Friend or the charges against him will have been dismissed. However, it is now clear that, absent intervention by the Court, privileged material will be disclosed before any prima facie case has been established.

6. Mr. Glendon's proposed disclosure of privileged material in his opening is particularly inappropriate in this case because severance, even if denied at this time, may well be forthcoming during the course of the trial and prior to the time Mr. Friend is called upon to present his affirmative case.

7. All of these problems and many others which can be anticipated at trial would be obviated by a severance now. However, in the absence of such relief, we urge the Court to direct Mr. Glendon to refrain from revealing the

substance of privileged communications in his opening to the jury.

Larry M Lavinsky
LARRY M. LAVINSKY

Sworn to before me this
20th day of October, 1976

Lois D. Thompson
Notary Public

LOIS D. THOMPSON
NOTARY PUBLIC, State of New York
No. 41-[illegible]
Qualified in New York County
Commission Expires March 30, 1977

United States Department of Justice

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
ONE ST. ANDREW'S PLAZA
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ADDRESS REPLY TO UNITED STATES ATTORNEY AND REFER TO INITIALS AND NUMBER

PMH:cc

BY HAND

9241

May 12, 1976

Honorable Charles M. Metzner
United States District Judge
United States Courthouse
Foley Square
Room 2201
New York, New York 10007

Re: United States v. AMREP, et al.
75 Cr. 1023 (CMM)

Dear Judge Metzner:

It appears that there are or may develop possible conflicts between some defendants now represented by the same attorney, and between some trial counsel and their past clients. The Government suggests that it is appropriate and necessary to have a hearing at which the affected parties, counsel and clients, are present, so that the Court may determine whether the affected parties are aware of the possible conflicts and, if so, whether they knowingly and intelligently waive any possible conflict. See United States v. Bernstein, ___ F.2d ___, Dkt. No. 74-2523 (2d Cir. March 4, 1976); United States v. Marl, 526 F.2d 117, 119 (2d Cir. 1975); United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975); United States v. Deberry, 487 F.2d 448, 452-454 (2d Cir. 1973).

In addition to Messrs. Fleming and Arkin each representing two individual defendants, we are aware of other potential conflicts. During the course of the Grand Jury investigation, Mr. Arkin represented witnesses who later appeared before the Grand Jury. These witnesses may be called by the Government at the trial. These witnesses may have had confidential communications with Mr. Arkin.

9/17

The three attached lrs. in U.S. v. Amrep. (May 12, 27 and June 7, 1976) are to be docketed and placed with the opinion deciding Def. Friend's mot. of 8/3/76, but are not to be made a physical part of that motion.
Thanks.
CMM.

138

A 9242

PMH:cc
BY HAND

Honorable Charles M. Metzner May 12, 1976

Therefore, we request that the Court also explore whether this prior representation of witnesses by Mr. Arkin will affect his representation of defendants Howard Friedman and Henry Hoffman, and whether these defendants are aware of and appreciate the difficulties inherent in this situation. For example, Mr. Arkin may have to cross examine witnesses who were his clients and with whom he may have had confidential communications. See United States v. Armedo-Sarmiento, supra. Of course, a defendant can elect to waive those particular rights which might be affected by his attorney's conflict of interest or his conflict with a co-defendant, and we take no position as to whether there should be a waiver here.

So, too, the firm of Rogers and Wells previously represented AMREP Corporation from at least 1961 to 1969 and Mr. Glendon, the attorney for Solomon H. Friend, is and was during that period of time a partner in Rogers and Wells. Therefore, we request the Court to make similar inquiries in connection with Mr. Glendon's present representation of Solomon H. Friend and his firm's past representation of AMREP, a co-defendant of Mr. Friend.

Very truly yours,

ROBERT B. FISKE, JR.
United States Attorney

By: Patricia M. Hynes
PATRICIA M. HYNES
Assistant United States Attorney
Chief, Consumer Frauds Unit
Telephone: (212) 791-0048/49/50

PMH:cc
BY HAND

Honorable Charles M. Metzner May 12, 1976

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A 9244

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AND REFER TO
INITIALS AND NUMBER

PMH:cc

BY HAND

United States Department of Justice

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
ONE ST. ANDREW'S PLAZA
NEW YORK, NEW YORK 10007

Rec'd JUN 1 1976
M/b CRIM

(138)

May 27, 1976

Honorable Charles M. Metzner
United States District Judge
United States Courthouse
Foley Square
Room 2201
New York, New York 10007

Re: United States v. AMREP, Et Al.
75 Cr. 1023

Dear Judge Metzner:

With reference to our letter of May 12, 1976, we neglected to mention that Mr. Kasanof, who is the attorney for Herman B. Oberman, represented witnesses who received immunity and testified before the Grand Jury. Therefore, we also wish the Court to explore with Mr. Kasanof, in the presence of his client, whether his prior representation of witnesses in the Grand Jury will affect his representation of Mr. Oberman and whether Mr. Oberman is aware of the difficulties inherent in this situation.

Furthermore, after careful examination of the affidavits filed in this case and documents in the possession of the Government, we are constrained, but feel obligated, to advise the Court that the representation of Solomon H. Friend by Rogers and Wells, Esqs., may be a violation of Canon 5 of the Code of Professional Responsibility and the Disciplinary Rules thereof. We have endeavored to resolve this matter informally with Mr. Glendon, but it appears that he does not agree that any ethical conflict exists.

Honorable Charles M. Metzner May 28, 1976

The cause for our concern is that the performance, advice and reputation of Rogers and Wells will be a central issue at the trial since Rogers and Wells represented AMREP until 1968. The terms of DR 5-102(a) require that when

> a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except . . . in the circumstances enumerated in DR 5-101(B)(1) through (4).

Mr. Glendon has pointed out that he represents Mr. Friend not AMREP; that Rogers and Wells represented AMREP prior to Mr. Friend's employment by AMREP and that Mr. Winslow who serviced AMREP is a former partner of his. However, Mr. Friend's motion papers and the affidavit of Mr. Winslow, formerly a partner in Rogers and Wells and now a partner in Jacobs, Persinger & Parker, Of Counsel in this case, make clear that at a very minimum Mr. Winslow will be a witness on Mr. Friend's behalf. Substantial testimony may also be offered that Mr. Friend relied heavily on the fact that Rogers and Wells, a prestigious firm, served for many years as counsel to AMREP. Mr. Friend may argue and testify, it seems fair to infer, that he justifiably relied on the work of this firm, currently an advocate on his behalf, and that he tried to follow their example at all times, and that Rogers and Wells and its partners were not indicted. While Mr. Winslow may be the chief "Rogers and Wells" witness, we think it is clear

that Rogers and Wells' performance, advice and reputation inevitably will be a substantial issue. For example, we know of documents wherein the Rogers and Wells firm name and their representation of AMREP was used to assure regulatory bodies that AMREP was seeking to operate properly. These documents are on Rogers and Wells stationary which includes Mr. Glendon's name.

In addition to the relative certainty that Mr. Winslow and the Rogers and Wells firm will be witnesses on behalf of Mr. Friend, there are other distinct problems of a similar nature. It seems quite clear, for example that other defendants in relying on the advice of counsel defense will tout Rogers and Wells, and Jacobs, Persinger and Parker on their behalf. They will argue that it was Rogers and Wells' advice they were allegedly relying on for so many years. One version of this defense will certainly state that if anyone is in error or wrong it is not the corporation and its officers, but the Rogers and Wells law firm which gave the advice. Moreover, Mr. Winslow may very well become a witness against the defendants when he testifies as to what information he was given before he gave advice, and further when Mr. Friend's performance and knowledge is contrasted to that of Rogers and Wells and Jacobs, Persinger and Parker. See DR 5-102(B).

In summary, it appears inescapable that one or more parties to this litigation, necessarily including Mr. Friend, will present evidence concerning Rogers and Wells' conduct, reputation and advice over a number of years, and will seek to argue for or against such conduct, reputation, and advice of Rogers and Wells, and the credibility of witnesses now or formerly with the firm who will testify about their work while associated with the firm. It appears that Canon 5 and the applicable discip-

linary rules and ethical considerations were intended to reach the situation we have here where the trial counsels' firm's conduct, knowledge and advice will be critical issues at the trial either for against the present client and/or former client.

In our informal discussions, as stated above, Mr. Glendon has distinguished Canon 5 on the grounds that (1) Rogers and Wells did not represent Friend before and (2) Mr. Winslow is a former partner in his firm. As to the first point, the disciplinary rules and ethical considerations do not suggest or imply that past representation of the current client is a consideration. All that is involved is whether the advocate will be a witness of any kind on a material issue. As to the latter point, we find Mr. Winslow's status as a former partner irrelevant for three reasons: First, his testimony will cover the time period when he was a partner, and will address the activities of himself and the firm at that time. Second, more than Mr. Winslow's individual conduct is at issue; Rogers and Wells' conduct, knowledge, reputation and advice are at issue. Finally, Mr. Winslow is a partner in a firm which is actively assisting in the defense of this case.

We recognize that International Elec. Corp. v. Flanzer, 527 F.2d 1288 (2d Cir. 1975), permits a law firm to represent a former partner as a party defendant, but we suggest that case is completely distinguishable from the instant situation, since there the former partner's conduct was necessarily a critical issue already subject to conflicting arguments because he was a party in the lawsuit. Here, that conduct will only become an issue ripe for the same conflicting advocacy after and by virtue of the firm becoming a witness. As such, it "taints the trial of the cause before" the Court when

it otherwise would not without Rogers and Wells' presence as an advocate. W. T. Grant Co. v. Hains, ___ F.2d ___, Dkt. No. 75-7385 (2d Cir. March 9, 1976).

The Courts have not hesitated to enforce these critical ethical considerations. See generally, Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386 (2d Cir. 1976). The Second Circuit has noted that "[i]t has been widely recognized that lawyers representing litigants should not be called as witnesses in trials involving those litigants if such testimony can be avoided consonant with the end of obtaining justice." [citing former A.B.A. Canon No. 19] United States v. Alu, 246 F.2d 29, 33 (2d Cir. 1957). Conscious of the need for ensuring "objectivity in the presentation of evidence", the Court in Alu held it improper for the Chief of the Criminal Division for the Eastern District of New York, in order to establish materiality in a perjury trial, to testify as to the subject matter and progress of the Grand Jury investigation when he was a superior of the trial assistant, he had drawn up the perjury indictment and had helped present the Government's case at the perjury trial where he was a witness. Similarly, testimony by an attorney has been precluded where the attorney did not withdraw from the case. United States v. Clancy, 276 F.2d 617, 636 (7th Cir. 1960). However, the better procedure, where there is sufficient notice, is for the attorney to withdraw. Christensen v. United States, 90 F.2d 152, 154 (7th Cir. 1937), rev'd on other grounds, 365 U.S. 312 (1961). See J. Sutton, "The Testifying Advocate," 41 Tex. L. Rev. 477 (1963); Ethical Consideration 5-10 ("doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate").

Finally, the most recent Formal Opinion of the Ethics Committee of the American Bar Association, No. 339

(January 31, 1975), supports the view that Rogers and Wells should not represent Mr. Friend where its own conduct is such a material issue in the case. Furthermore, that Opinion makes clear that even if the very narrow exception of DR 5-101(B)(4) were held to apply

> the lawyer or firm concluding under this standard to continue as counsel should advise the court and opposing counsel immediately that he, or a lawyer in his firm, intends to testify and the nature of the testimony. He should also refrain from expressly arguing the credibility of his own testimony or that of a lawyer in his firm. Op. at 6.

In light of the foregoing, we request the Court to explore this situation with Mr. Glendon in the presence of Mr. Friend and AMREP in order to determine whether Mr. Glendon can continue to represent Mr. Friend and, if so, to advise the Court and the Government of the identity of the lawyers, either presently or previously associated with Rogers and Wells, who will be called to testify and what the nature of their testimony will be.

Very truly yours,

ROBERT B. FISKE, JR.
United States Attorney

By: Patricia M. Hynes
PATRICIA M. HYNES
Assistant United States Attorney
Telephone: (212) 791-0048/49/50

cc: George Gallantz, Esq.
Proskauer, Rose, Goetz & Mendelsohn, Esqs.
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Attorney for Defendant:
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Robert Kasanof, Esq.
Baer & McGoldrick, Esqs.
Attorney for Defendant
Herman B. Oberman
460 Park Avenue
New York, New York 10022

PMH:cc

Honorable Charles M. Metzner

May 28, 1976

cc: William Glendon, Esq.
Rogers & Wells, Esqs.
Attorney for Defendant
Solomon H. Friend
200 Park Avenue
New York, New York 10017

A 9252

5th Jun. 7/6/1976

Rogers & Wells

Two Hundred Park Avenue

New York, N. Y. 10017

TELEPHONE (212) 972-7000

INTERNATIONAL TELEX
RCA 224493
ITT 424493

138

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JOHN A. WELLS
CAESAR L. PITASSY
EUGENE L. BONDY, JR.
FREDERICK W. P. LORENZEN
STUART A. JACKSON
H. ALLEN LOCHNER
ROBERT E. FRISCH
WILLIAM F. KOEGEL
WILLIAM R. GLENDON
EUGENE T. ROSSIDES
FREDERICK P. GLICK
FIORAVANTE G. PERROTTA
THOMAS H. McBRIDE
JOHN B. LOUGHRAN
LEO P. LARKIN, JR.
STANLEY GODOFSKY
HERBERT C. EARNSHAW
ROGER A. CLARK
H. CHESTER GRANT
DAVID F. DOBBINS
ROBERT D. LARSEN
DAVID W. BERNSTEIN
CHARLES A. SIMMONS
JOSEPH DIAMOND

RICHARD N. WINFIELD
JOHN J. SHEEHY
PETER R. FISHER
ROBERT A. LINDGREN
GUY C. QUINLAN
JOSEPH H. SPAIN
WARD B. STEVENSON, JR.
ALAN M. BERMAN
LAUSON H. STONE
LOREN C. BERRY
FREDERICK G. TATE
JAMES E. KOEGEL
WILLIAM S. GREENAWALT
BRUCE R. TUTTLE, JR.
ROBERTA S. KARMEL
GEORGE O. DESHENSKY
C. GRANT ANDERSON
JOHN M. LIFTIN
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EUROPEAN OFFICE
ANTHONY F. ESSAYE
RESIDENT PARTNER
24 RUE DE MADRID
75008-PARIS, FRANCE
TELEX 290617

CABLE ADDRESS
"YORKLAW" NEW YORK
"WALAW" WASHINGTON
"EURLAW" PARIS

June 7, 1976

BY HAND

Hon. Charles M. Metzner
United States District Judge
United States District Court for
the Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: United States v. AMREP, et al.
75 Crim. 1023 (CMM)

Dear Judge Metzner:

This replies to the Government's letter of May 27, expressing concern as to my firm's position as counsel for Mr. Friend in this case.

On May 17th the Government represented to the Court in opposing Mr. Friend's severance motion that "the bulk of the Government's evidence at trial is not going to dwell on the years 1961-1970 at all" (Oral Argument, Tr. p. 51). Now, ten days later, we are told that pre-1968 conduct of Rogers & Wells "will be a central issue at the trial" (letter pp. 2, 3, 4 and 6). The Government's current contention is based principally upon its expectation that Mr. Winslow, who was a partner in our firm until February 1968*, will be a witness at trial.

---

* At that time the firm was known as "Royall, Koegel, Rogers & Wells", and for the six years before January 1967 had been known as "Royall, Koegel & Rogers". When Mr. Winslow left, AMREP ceased to be a client of the firm.

Even assuming that Mr. Winslow's activities before he left our firm might be at issue, there is no basis for the Government's contention. The Disciplinary Rule cited by the Government expressly applies only where a lawyer or a lawyer "in his firm" will or should be called as a witness (DR 5-102). Similarly, Ethics Opinion No. 339 cited by the Government (letter pp. 5-6) confirms that the rule concerns a lawyer who is presently a member of a firm. And, as the Government concedes (letter, p. 4), the Second Circuit has made clear that proscription is not applicable where "a former partner may be a witness." International Electronics Corp. v. Flanzer, 527 F.2d 1288, 1294 (2d Cir. 1975) (emphasis in original).

The cited Rule is meant to prevent a lawyer who represents a party to a litigation and thereby has an "interest in the outcome of the trial", from testifying therein. Otherwise the lawyer/witness might be subject to impeachment as a result of that interest. E.g., ABA Ethics Opinion No. 339, p. 2. This policy has no relevance here. Mr. Winslow has no interest in the outcome of the trial which arises from Rogers & Wells' representation of Mr. Friend. Accordingly, he is not subject to impeachment on this ground. Further, there is absolutely no reason to believe that Mr. Winslow's testimony would be any different whether I or a member of another firm were sitting at the counsel table on behalf of Mr. Friend. Conversely, there is no reason why the Government would in any way be handicapped by my presence as Mr. Friend's counsel in cross-examining Mr. Winslow (see Flanzer, supra, 1294).

Apparently realizing the weakness of its ethical contentions concerning Mr. Winslow, the Government is constrained to argue that "the Rogers and Wells firm" will testify (letter p. 3). "The firm", of course, cannot testify, and we do not intend to call any present member of this firm as a witness [DR 5-102(A)]. Nor do we have any reason to believe that any such member may otherwise be called, or that, even if called, his testimony would be prejudicial to Mr. Friend [DR 5-102(B)].

The nub of the Government's professed concern seems to be that witnesses may testify at trial that they relied upon the reputation or conduct of this law firm. Even assuming such testimony, we are unaware of any authority suggesting that this firm should thereby be disqualified. Certainly, the

Government has cited none. The Government's authorities are concerned solely with whether a party's lawyer will testify, not with whether there will be testimony about the party's lawyer.

Finally, even if there were any substance to the Government's contention of conflict (and, plainly, there is not), the exception set forth in DR 5-101(B)(4) would apply.* This firm has been involved in this matter on Mr. Friend's behalf for nearly 18 months, during which time we have, of course, accumulated substantial background and knowledge of the case. It would be patently and substantially prejudicial to deprive Mr. Friend of his chosen counsel at this date -- particularly when the Government has unjustifiably waited this long to raise this question.**

In short, I submit the Government has demonstrated no basis for requiring Mr. Friend to seek new counsel. If the Court desires any further information, however, we shall of course be willing to provide it.

Respectfully,

William R. Glendon

cc: Patricia M. Hynes
Assistant United States Attorney

All Defense Counsel

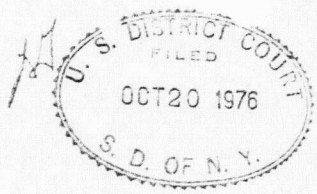
---

* See DR 5-102(A), which permits continued representation by a lawyer, even if he may be called as a witness, under the circumstances set forth in DR 5-101(B)(4), that is:

> ". . . if [disqualification] would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case."

** It should be noted that Mr. Winslow testified before the Grand Jury investigating this case.

A 9255



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA, :

-against- :

AMREP CORPORATION, et al., :

Defendants. :

- - - - - - - - - - - - - - - - - x

S 76 CR. 644 (CMM)

ORDER TO SHOW CAUSE

FOR SEVERANCE

Upon the annexed affidavit of William R. Glendon, sworn to October 19, 1976, and exhibits annexed thereto, and upon all other prior papers and proceedings herein, and sufficient cause appearing therefor, it is

ORDERED, that counsel for the United States of America, and all defendants in the above action other than Solomon H. Friend, show cause before this Court, at the United States Courthouse, Room 35, Foley Square, New York, New York, on the 21 day of October, 1976 at 10 o'clock in the ~~fore~~noon of that day, or as soon thereafter as counsel can be heard, why an order should not be entered herein, directing that defendant Solomon H. Friend be severed for a separate trial, pursuant to Rules 8 and 14, Federal Rules of Civil Procedure, and for such other and further relief as to the Court may seem just and proper; and it is further

ORDERED, that PERSONAL service of a copy of this Order to Show Cause and the supporting papers thereto upon the attorneys for the United States and each defendant in this action, other than Solomon H. Friend, at the respective offices of said attorneys,

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A 9256

on or before October 20, 1976 at 11 o'clock in the ~~noon~~ P.M. be deemed sufficient.

Dated: New York, New York
October 19, 1976

Charles H. Metzner
United States District Judge

A 9257

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA, :

-against- :

AMREP CORPORATION, et al., :

Defendants. :

- - - - - - - - - - - - - - - - - - x

S 76 CR. 644 (CMM)

AFFIDAVIT IN SUPPORT OF RENEWED MOTION TO SEVER

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

WILLIAM R. GLENDON, being duly sworn, deposes and says:

I am a member of the firm of Rogers & Wells, attorneys for defendant Solomon H. Friend herein. I make this affidavit in support of Mr. Friend's application, by Order to Show Cause, for an order, pursuant to Rules 8 and 14, Federal Rules of Criminal Procedure, severing him for a separate trial. The reason this application is brought on by Order to Show Cause, and not by Notice of Motion, is that there is insufficient time for a Notice of Motion prior to the final pretrial conference, scheduled for October 21, 1976. No previous application for the same relief has been made, except as expressly referred to in this affidavit.

As set forth in my affidavit of January 23, 1976, submitted in support of the original motion to sever, I anticipate that Mr. Friend's defense will require the introduction of numerous documents reflecting confidential attorney-client communications. I also anticipate that Mr. Friend will be asked to testify extensively as to other confidential communications which occurred in the course of the attorney-client relationship, or in the councils of the defense before Friend was advised that he was a target of the investigation. In its opposition to the motion to sever, the government urged that the attorney-client privilege may have ceased to exist before Friend is called upon to present a defense.

However, in my opinion, as Friend's counsel, it is essential that I make reference in the opening statement to such communications and read or summarize certain of them. It is also essential, I believe, that this statement be made at the outset of the trial. I believe that counsel for Friend's clients intend to object to any reference in the opening statement, to such confidential attorney-client communications. If this objection is sustained, it would effectively preclude a meaningful opening statement on behalf of Friend, and his defense would be gravely and irreparably prejudiced thereby.

In a joint trial, the jury will be subject to an enormous volume of evidence relating to defendants other than Friend. This is now made crystal clear by the government's designation of witnesses and documents, as discussed in the accompanying memorandum. At the best, despite any instructions to the contrary, there will be a serious risk that the huge quantities of evidence as to other defendants will "rub off" on Friend. If there is to be any hope of avoiding a prejudicial spill-over effect, it is crucial to Friend's defense that his counsel be permitted to state to the jury, clearly and at the outset, the nature of Friend's unique position in the case, and the differences between his situation and that of the other defendants.

Mr. Friend was not among the founders or financial principals of the defendant corporations. He was the general counsel to the corporate defendants, and his presence in this case obviously focuses upon his legal advice and services to the other defendants. Clearly, a crucial part of his defense must consist of showing that he rendered such legal services in good faith, and this in turn will depend heavily upon disclosing and explaining numerous attorney-client communications. Such an exploration of attorney-client communications is central to Mr. Friend's defense, and if

I am not permitted to refer to such communications, I do not see how it will be possible to make a meaningful opening statement on his behalf.

For example, a very large part of the case will obviously turn upon the alleged conduct of salesmen at dinner parties and other sales presentations. While not conceding that the alleged events occurred, or would have constituted crimes even if they had, I intend to make it clear to the jury from the very beginning that any such occurrences would have been against the advice of Mr. Friend. For example, I would propose to describe to the jury, and possibly even to read in whole or in part, from a memorandum which Mr. Friend sent to his clients in November of 1970:*

> "I feel it is important that a meeting of the regional managers be held as soon as possible for an orientation as to the procedures to be followed in each sales office, contracts to be used, and to insist on closer supervision of the literature, and procedures used in each sales office.
>
> * * *
>
> "Furthermore, most of the complaints we receive from state agencies relate to statements allegedly made by salesmen and practices contrary to company policy. Some of these consumer complaints emanate more frequently from certain offices than other offices.
>
> "In this business, it is my considered judgment that we must be more chaste than Caesar's wife and that the above aspects of our operation must be tightened up."

And I propose to tell the jury, in this connection, that we will prove that the orientation meeting referred to was held, and that the salesmen were so instructed.

---

* Copies of this and other privileged memoranda, which Mr. Friend was permitted to read to the grand jury under Judge Duffy's order of October 15, 1975, are annexed to this affidavit as Exhibits A through M.

I also intend to point out in the opening statement that Mr. Friend assembled a strong law department, which the corporate defendants had not had before, for the purpose of insuring compliance with all applicable laws and regulations, and that he relied heavily on his staff attorneys for this purpose. I intend, for example, to quote from an internal memorandum that Mr. Friend sent to one of his staff attorneys, in October 1971, with reference to Amrep's manual of sales policy:

> "I would like for you to review the Manual carefully to see whether there is anything in the Manual which might involve us in a claim of misleading sales and advertising methods.
>
> "I am particularly concerned that our Manual be clean because of the fact that the FTC has begun an investigation of Horizon's sales methods and has subpoenaed Horizon's Sales Manual. Specifically, watch for instructions concerning promises of resale, return on investment, etc.
>
> "Dave, this is very important so please consider it one of your priority items."

I intend also to refer to the staff attorney's answering memorandum, which assured Mr. Friend that the company manual had been checked, and that no such problems existed.

Further on the subject of investment and resale, I intend to call the attention of the jury to a memorandum which Mr. Friend sent to his clients in February of 1972, which concluded as follows:

> "Conclusion: The above reinforces my previous concern that all reasonable steps should be taken to avoid improper references to an investment theme particularly in printed advertising, and to properly control salesmen's oral representations concerning resale investment or guarantees.
>
> "In this connection, as previously discussed with Hank Hoffman, our Rio film and other Rio material should be revised as soon as the film advertising departments can get to it."

Further, the jury will be hearing testimony concerning complaints made by customers who purchased land at Rio Rancho, and what was done or not done with respect to these complaints. I consider it highly important that I should be able to tell the jury that we will prove Mr. Friend reacted vigorously to such complaints when they were brought to his attention. Thus, I would propose to read to the jury, in my opening statement, a hand written memorandum which Mr. Friend sent to defendant Daniel Friedman, in response to complaints received in connection with defendant ATC Corporation: "What the heck is wrong!!! In other areas we get practically no complaints or 'misunderstandings'. Check it out at once!!" And I would tell the jury that we intend to prove that Mr. Friend's clients assured him that all of these complaints related to old sales, and that the sales practices involved had been improved and corrected.*

Many more examples could be given. It may be necessary and important in the opening statement to refer to a number of other privileged documents, including those annexed as exhibits to this affidavit.

It would be difficult to over-emphasize the importance of this opening statement to Mr. Friend's defense. He faces a trial in which months will elapse before he is permitted to begin his defense, and in which an enormous quantity of evidence relating entirely to other defendants will be presented to the jury. If Mr. Friend's case is to be tried on its own merits, not simply submerged in the mass of evidence relating to other defendants, it is crucial that his counsel should be able to present his anticipated defense to the jury, at the start of the

---

* Mr. Friend also testified to this in the grand jury.

trial, clearly and specifically. Since attorney-client communications are the very heart of that defense, Mr. Friend's position cannot be adequately presented if his counsel is precluded, by objections from other defendants, from referring to such communications. Whatever may be the right of other defendants to object to the disclosure of attorney-client communications, the opening statement on behalf of Friend must include references to them, in order to be an adequate presentation of his defense.

WHEREFORE, I respectfully request that the motion to sever be granted in all respects.

William R. Glendon

Sworn to before me this
19th day of October, 1976

Guy C. Quinlan
Notary Public

GUY C. QUINLAN
NOTARY PUBLIC, State of New York
No. 31-2102585
Qualified in New York County
Commission Expires March 30, 1977

November 11, 1970

A 9263

M E M O

TO: HOWARD M. FRIEDMAN
CHESTER CARITY
DAN FRIEDMAN
PETE ZAKICH

FROM: SOLOMON H. FRIEND

I feel it is important that a meeting of the regional managers be held as soon as possible for an orientation as to the procedures to be followed in each sales office, contracts to be used, and to insist on closer supervision of the literature, and procedures used in each sales office.

Frankly, the instances are becoming more and more frequent whereby unauthorized literature is printed and distributed, contracts are used without submission to the legal department, wrong purchase agreements are used, etc.

Furthermore, most of the complaints we receive from state agencies relate to statements allegedly made by salesmen and practices contrary to company policy. Some of these consumer complaints emanate more frequently from certain offices than other offices.

In this business, it is my considered judgment that we must be more chaste than Ceasar's wife and that the above aspects of our operation must be tightened up.

Such an orientation session can be scheduled for the next regional managers meeting but if that is a long way off, I think the above deserves a special meeting. Your thoughts are most welcome.

SHF/cs

EXH. A

A 9264

November 20, 1970

TO: LEN BERKOWITZ
FROM: SOLOMON H. FRIEND

Please follow up on yesterday's sales meeting. Meet with Pete Zaknich and Dan to set up new procedures and controls to assure against recurrence of following problems:

1. Sales by unlicensed salesmen
2. Use of unauthorized literature
3. Use of incorrect contracts

Also, we should assemble sets of all authorized SSS & Rio contracts and literature so that Regional managers know what is to be used. See Larry Perlmutter about this.

Also, check Georgia law re: licensed salesman by calling ISAKSON (see file).

SHF/es

COPY

EXH. B

A 9265

August 7, 1971

TO: DIRECTOR COUNTY, [illegible] FRIEDMAN, DAN FREEDMAN

In order to obtain timely information as to customer complaints at all offices, I am planning to put into effect a procedure for monthly reporting and tabulation of the origin of the complaints, the salesmen involved and the nature of the complaint. This will enable us to find out, on 30-day intervals, whether a pattern exists with respect to any salesman or any office so that corrective measures can be taken before we have another "M.R.C." situation.

In addition, I am in the midst of reviewing all of the form letters used to reply to customer inquiries and the procedures used in handling a customer inquiry. Often times form letters are used which are not pertinent to the customer's inquiry and as a result additional correspondence is generated and the customer becomes needlessly irritated. Marianne Newman and Al Lipman have mentioned to me the absence of clear and unambiguous policy in the handling of complaints.

Before any final revised procedures are instituted, I will let you know so that I can have the benefit of your comments.

MR/as

OK

EXH. C

A 9266

October 19, 1971

TO: DAVE PARKOFF
FROM: SOLOMON FRIEND

Attached is Amrep's Manual of Office Procedures with new pages to replace some outdated material.

Please insert the new pages in accordance with instructions.

I would like for you to review the Manual carefully to see whether there is anything in the Manual which might involve us in a claim of misleading sales and advertising methods.

I am particularly concerned that our Manual be clean because of the fact that the FTC has begun an investigation of Horizon's sales methods and has subpeonaed Horizon's Sales Manual. Specifically, watch for instructions concerning promises of resale, return on investment, etc.

Dave, this is very important so please consider it one of your priority items.

SHF/es
cc: Art Mantel
Lou Bastone
Jack Friedman

EXH. D

A 9267

_M_E_M_O_

TO: Solomon Friend

DATE: October 21, 1971

FROM: I. David Parkoff

SUBJECT: Amrep Manual of Office Procedures

I have reviewed the above manual, as you requested, and have not found any material to which your memo of 10/19/71 was specifically directed at. However, I did observe the following items which I am bringing to your attention:

1) Page 308, "Burn Off Letter"

This is used to inform an invitee to a dinner party that we are "booked solid" and that we are going to schedule him for a future dinner, which he will be able to attend.

Our practice of employing this as a sales procedure might be construed as a policy of inviting more people than we know we can accommodate, overbooking, making commitments to the public that we cannot meet.

2) Page 414, "Confirmation Phone Call"

The instruction, to the Sales Office Manager to make this call the morning after a sale includes among its purposes: "to eliminate the buyer's remorse". This kind of statement on our part could be construed as to be defensive in that we feel guilty about the manner in which we sold the HSO.

3) Page 420, "HSO Welcome Letter"

This is sent out after a purchase and refers to "the potential for rising land values in the Florida/ Silver Springs Shores area". We should be careful about representing higher land values.

4) Page 506, "Flight Letter"

It recites: "these tours are only for adults 18 years, or over". I feel our policy should be not to accept any HSO, unless he is over 21 years of age. In those states that are lowering their age of majority, we could consider a lower age.

EXH. E

A 9268

M E M O

5) Page 511, "HSO Service Letter"

This letter informs the new HSO that, when he is ready to visit the property, we can make arrangements for his trip and save him money at the same time. It specifically refers to discounts on motel, sightseeing, shopping, car rentals, etc. I am concerned about the blank representations about discounts may be construed as a come-on and thought misleading.

6) Page 916, "Multiple Dwelling and Commercial Property"

The requirements here is that in order to purchase this type of property, the customer must own or simultaneously purchase residential property. I am not sure that this stipulation violates anything. But why?

I understand that this manual is part of a series, the others currently in preparation are the Amrep Trainers Guide and Amrep Training Manual. For our own benefit, these should also be reviewed for the type of material referred to in your 10/19/71 memo.

c.c.: Jack Friedman
Louis J. Bastone
Arthur S. Mantel

A 9269

November 1[illegible], 1971

TO: FLOYD VANDEWART
FROM: SOLOMON FRIEND

I would like for you to schedule a meeting of the Advertising Department during which time I would like to view the current Rio and Silver films, make comments with respect thereto and make a statement to your staff concerning the advertising standards and direction to be pursued in future advertisements.

SHF:es
cc: Hank Hoffman

EXH. F

A 9270

February 17, 1972

TO: HOWARD FRIEDMAN, CHESTER CARITY, HANK HOFFMAN, DAN FRIEDMAN
FROM: SOLOMON FRIEND
RE: FTC

Arthur Mantel has reported on his meeting with the Interstate Land Sales Group in Miami on February 14th. For your information his report includes the following reference to present and possible future problems which the industry confronts concerning the FTC.

1. Great Western Cities and the FTC

Great Western Cities is presently in negotiations with the FTC. The company is about to agree to a Consent Order with regard to its advertising practices. The attorney for the corporation advised us that the FTC basically came in because of customer complaints concerning the promise of profits and the heavy investment theme in their advertisements. Under the Consent Order, Great Western Cities will not be allowed to use certain types of advertising themes and/or words.

2. General Development

I was informed by David A. Doheny that General Development submits its contract to the FTC for comment. This is quite interesting as it shows their intent to comply with FTC law.

3. New FTC Bill

A bill, S. 986--Magnuson-Moss, has passed the Senate and is now in the House Committee. This bill would expand the FTC jurisdiction in the following manner:

a. it would authorize the FTC to seek preliminary injunctions in addition to their power of getting a cease and desist action;

b. the FTC would be authorized to bring class actions on behalf of consumers victimized by deceptive practices; and

c. the FTC would be authorized to issue rules and regulations specifying activities which it considers deceptive and unfair.

4. Horizon v FTC

Horizon has been in negotiation with the FTC in regard to their advertising practices. The FTC Washington office took up the matter after a customer complaint was filed with the Seattle

EXH. G

Regional Office of the FTC. The Washington examiner, a man named Kennedy, asked for the following materials from Horizon:

a. all advertising material

b. a list of Horizon's salesmen

c. the training manual for the corporation, and

d. customer lists.

Horizon supplied the first three items but refused to give the FTC customer lists and, as it worked out, the FTC backed down from its demand for the customer lists. It was the general feeling of the group that the FTC will take further interest in the land industry, and that the respective companies should be prepared.

Yingling mentioned that in his meeting with the FTC representative, (which occurred when he accompanied Al Lehtonen to the FTC), he was told that the following matters were of importance to the agency:

a. the advertising material used by the corporation

b. the corporation's handling of complaints

c. the procedure by which the company refunds or forfeits purchasers' monies

d. the company's justifications for its prices

5. My general impression of the meeting was that all the land companies are having troubles with their advertising in the sense that they are all afraid to push the investment theme too hard and are afraid of further FTC actions. David A. Doheny agreed that the Horizon Corporation with its constant stress on investment and profit, is pushing its luck and that eventually it will face severe problems. We are on the right track in our attempt to constantly upgrade our advertising material and laying off the investment theme.

Wells O'Brien is no longer the general counsel for McCulloch Properties. He has moved to Reno and will supervise the formation of one of McCulloch's developments. His replacement is a fellow named Bob Lago, who told me that his company is perplexed as to the

A 9272

type of advertising material to use and that their registrations are in terrible shape. Their Registration Department has not complied with the amendment procedure for registrations as required by HUD and he is in the process of reorganizing the department. This is interesting since I know we both thought that McCulloch was extremely proficient and had no problems at all with its registrations.

Conclusion: The above reinforces my previous concern that all reasonable steps should be taken to avoid improper references to an investment theme particularly in printed advertising, and to properly control salesmen's oral representations concerning resale investment or guarantees.

In this connection, as previously discussed with Hank Hoffman, our Rio film and other Rio material should be revised as soon as the film and advertising departments can get to it.

SHF/es

A 9273

March 7, 1972

TO: Dan Friedman
FROM: Solomon Friend
RE: Distribution of Property Reports at dinner parties

I have your memo requesting a summary of the procedure for distribution of State and Federal reports in each of our offices. Rather than have a different procedure for each state, I suggest that you send our sales personnel a memorandum along the following lines:

"Federal law requires that all property reports must be delivered to purchasers in advance or at the time of the actual signing of the contract. To assure that the Federal law as well as the various state laws governing the distribution of property reports is fully complied with, a sufficient supply of property reports should be made available in a conspicuous place (on the table or elsewhere) and during the presentation, some reference should be made to the fact that we are registered under Federal and State laws and that a property report is available. At the close, if the customer does not yet have the property reports, a copy should be handed to him immediately before or at the time he affixes his signature to the contract. Under no circumstances should it be given to him after he has placed his signature on the contract. The consequences of a delivery of the property report after the contract is signed by the customer is that the contract is voidable at any time. If the customer is given the property report at the time of the actual signing of the contract or less than 48 hours prior to the signing of the contract, a customer has 48 hours after the signing of the contract to cancel but, I repeat, that if the report is delivered after the contract is signed by the customer, the 48 hour time limitation does not apply and the customer has the right to cancel the contract at any time in the future. Accordingly, in order to assure full compliance with the applicable laws and obtain the benefit of the 48 hour limitation, the property reports must be delivered before or at the time of the signing of the contract--not afterwards. The above procedures apply in all states except Connecticut which has a 72 hour period for cancellation."

SF/as
cc: Jack Friedman
Larry Perlmutter

EXH. H

A 9274

[illegible]

[illegible]

In December, we discussed the necessity for revising film and advertising material for Rio Rancho. As I told you, all of the material we are using had previously been approved by the applicable State agencies. Nevertheless, as part of our ongoing program of updating and re-examining advertising materials, to avoid misunderstandings, I felt that company policy in that regard required prompt implementation.

Accordingly, the many conferences we have had over the past weeks have been most helpful in achieving this goal. I understand that the film and advertising departments have been hard at work making appropriate changes and that the project will be completed in the near future. I have advised the Legal Department that all revised advertising copy and film scripts should be resubmitted to the appropriate regulatory agencies for approval.

I would appreciate periodic reports from the advertising and film departments concerning the progress and targetted completion date for this project.

[illegible]/sn

EXH I

A 9275

August 10, 1972

TO: JACK FRIEDMAN
FROM: SOLOMON H. FRIEND
RE: CUSTOMER COMPLAINTS

cc: Art Mantel
Dave Parkoff
Dave Waldman

I would like to have a list of all complaints now pending which were forwarded by HUD, New York, Maryland and any other state. I also would like to have a summary of the basis of the complaint. I am somewhat concerned at the increasing number of government complaints and feel that steps should be taken immediately to eliminate or at least minimize the possibility that similar complaints will recur.

SHF/es

COPY

EXH. J

A 9276

January 22, 1973

TO: DAN FRIEDMAN
FROM: SOLOMON FRIEND
RE: BOB BROWN'S REPORT

cc: Larry Perlmutter

I agree with you that Brown's report is excellent in that it enables us at a glance to spot problem areas. I agree that a similar reporting system, if possible, should be set up for our customer relations department at Rio.

Brown will be visiting Rio soon and should be instructed by Larry to follow through on this matter.

SHF/es

COPY

EXH. K

A 9277

July 6, 1973

Mr. Jack R. Muratori
State of New York
Department of State
270 Broadway
New York, New York 10007

Re: Bates with Silver Springs
Your File No. C-73-603

Dear Mr. Muratori:

Pursuant to our letter of July 2, 1973, we have completed our investigation of the above captioned matter. The sales representative who serviced Mr. & Mrs. Bates is no longer in our employ and, therefore, not available for comment.

In view of the above, we believe, this matter should be disposed of and we have, therefore, authorized the cancellation and complete refund for Mr. Bates.

We trust that the above information will enable you to close your file in this matter.

Very truly yours,

MAREP CORPORATION

B. B. Brown
Director, Customer Relations

BBB:ng

bcc: S.H.Friend - For your information
L.Perlmutter - " " "
H.Goldman, LTA - " " "

EXH. L

A 9278

September 7, 1973

TO: TED SCHREIER
FROM: SOLOMON FRIEDMAN
RE: NEW HUD REGULATIONS

cc: Dan Friedman

I have been reading the new HUD regulations which become effective December 1st. They appear to require substantial changes in some of the provisions of our contracts, our property reports and a plethora of new and technical information for the statement of record filing.

As far as the sales department is concerned, the most important changes pertain to:

1) Changes in the property report, including the requirement for a receipt.

2) Sales practices and advertising which is covered by Part 1715.

3) Certain affirmative disclosures mandated by the regulations and other "optional" disclosures without which the property report may be misleading. This latter provision is similar to the SEC prospectus disclosures. May I suggest that the legal department familiarize themselves with these various changes and work up a list, as soon as possible, for appropriate discussions with the sales department, as to the changes that the regs. have made necessary both in the contract and in the property reports.

While all filings after December 1 are covered by the new regs. any filings prior to December 1 can be brought in under the new regs. if developer requests that the filing be reviewed in the light of the new, rather than the old, regulations. My suggestion is that if time permits, any new filings that are made prior to December 1, be made under the new regulations so that we will have the benefit of HUD's thinking as soon as possible and thus avoid difficulties when filings are made after December 1.

SMF/cs

EXH. M

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA, :

-against- :

AMREP CORPORATION, et al., :

Defendants. :

- x

S 76 CR. 644 (CMM)

MEMORANDUM IN SUPPORT OF RENEWED MOTION FOR AN ORDER SEVERING DEFENDANT SOLOMON B. FRIEND FOR A SEPARATE TRIAL

On July 22, 1976, this Court denied the motions by defendant Friend, and by his client Amrep Corporation, to sever Friend for a separate trial, pursuant to Rules 8 and 14, Federal Rules of Criminal Procedure. At that time the Court, while noting that a successful motion for severance might later be made by Friend or defendant Amrep, held that "the Court has not been furnished with anything concrete to show prejudice justifying his severance." Defendant Friend now seeks to renew the motion to sever, because developments since the date of the Court's initial decision have made it clear that concrete prejudice to Friend will in fact occur.

As set forth in the original motion for severance, Friend's defense will necessarily consist in large part of disclosing confidential attorney-client communications, to demonstrate

that he at all times advised his clients in good faith to comply fully with the law. The Court, in its opinion of July 22, stated that, while Friend was clearly entitled to introduce privileged communications in his defense, the privilege may have ceased to exist "at the close of the government's case and before Friend is called upon to present his defense". However, the privilege exists now and its existence creates an irreconcilable conflict between the privilege and Friend's counsel's undoubted right to make an effective opening statement at the beginning of the trial, wherein he will have to make reference to a series of privileged communications between Friend and his clients. These communications are the keystone of Friend's defense that he was acting in good faith, in trying to advise his clients to avoid misleading, inaccurate or false representations concerning the sale of land. The recipients of this advice, Mr. Friend's clients, will, we believe, object to such disclosure to the jury. Yet Friend's right to due process and effective assistance of counsel under the Fifth and Sixth Amendments will be violated if he is precluded from having an effective opening statement made on his behalf at the beginning of the trial. There is no way that this problem can be resolved in a joint trial without substantial prejudice to either Friend or the other defendants.

Further, the government's purported compliance with the Court's order to submit a list of exhibits which it

intends to offer in evidence, now confirms as a fact the probability anticipated in the original severance motion: that the overwhelming bulk of the government's evidence will relate to the defendants other than Friend, and that Friend will be irreparably prejudiced by the spill-over effect of the evidence against such other defendants. The disclosures as to the government's case, since the Court's initial denial of the severance motion, make it clear that prejudice to Friend can only be avoided by a separate trial.

Friend's Right to Counsel Under the Sixth Amendment Would be Violated if His Counsel Is Not Permitted to Disclose Attorney-Client Communications to the Jury in His Opening Statement

Defendant Friend was not a founder or financial principal of the corporate defendants. He was not in charge of making sales policy. He was hired as general counsel to the company, and -- except for duties in construction and development, which are apparently not the basis of any charge against him -- his work consisted principally of giving legal advice to the other defendants herein, supervising compliance with federal and state regulations, and transacting other legal business. Clearly, his defense will necessarily consist of showing that he advised and counselled his clients lawfully and in good faith. Extensive and detailed evidence of attorney-client communications will form

the very heart of Friend's defense. Examples of such communications are set forth in the attached Glendon affidavit. This evidence, all privileged,* shows Mr. Friend expressing concern about "statements allegedly made by salesmen and practices contrary to company policy" and advising the clients that "In this business . . . we must be more chaste than Caesar's wife"; they show Friend advising the clients "to avoid improper references to an investment theme particularly in printed advertising and to properly control salesmen's oral representations concerning resale, investment or guarantees"; they show Friend demanding an explanation about an unusual number of complaints, and saying: "What the heck is wrong!!! In other areas we get practically no complaints or 'misunderstandings'. Check it out at once!!" This type of privileged testimony constitutes the key to Friend's defense and while exculpatory of him is obviously prejudicial to the other defendants and references thereto in the opening would undoubtedly be objected to by them.

Yet it is clear that an effective opening statement will be of crucial importance to Friend's defense. He faces a

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* By order dated October 15, 1975, Judge Duffy permitted Mr. Friend, over the objection of other defendants, to read this exculpatory evidence to the grand jury.

trial upon an indictment which covers a period of fifteen years, including almost a decade before Friend was employed by the defendant corporations. The government has refused to limit its proof under this omnibus indictment, despite repeated orders from the Court, and intends to offer literally hundreds of witnesses and thousands of pages of documents in evidence. As further discussed below, the overwhelming bulk of these documents have no relation to Friend, and the overwhelming majority of the witnesses have had no contact whatever with him. As to the attorney Friend, any joint trial herein presents, in an especially aggravated form, the frequently-recognized danger of prejudice in conspiracy cases involving multiple defendants.

One of the few possible safeguards, through which Friend might hope to minimize the prejudicial spill-over effect, would be an effective opening statement, setting forth to the jury, at the outset, Friend's contentions as to his unique and limited position in the case. Before Friend begins his defense, the jury will have been subjected to literally months of a shotgun presentation by the prosecution, involving masses of evidence relating to other defendants, often dating from years before Friend was employed by the defendant corporation. Unless Friend's counsel is permitted effectively to detail Friend's evidence at the outset, before the jury sits through the marathon presentation of the prosecutor's case, the defense as to Friend may

have been hopelessly prejudiced before it ever begins. This situation emphasizes, with particular force, the fact that "the defendant's right to present argument is part of his Sixth Amendment right to counsel and jury trial". United States v. Sawyer, 443 F.2d 712, 713 n.5 (D.C. Cir. 1971).

The central importance of argument by counsel was recently reemphasized by the Supreme Court in Herring v. New York, 422 U.S. 853 (1975). In Herring, the Court held unconstitutional, under the Sixth and Fourteenth Amendments, a New York statute which permitted the judge, in non-jury criminal trials, to decline to hear summations at the conclusion of the evidence. In holding that the provision of the statute violated constitutional guarantees of right to counsel, the Court observed (422 U.S. at 857-858):

> "The decisions of this Court have not given to these constitutional provisions a narrowly literalistic construction. More specifically, the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments. For example, in Ferguson v. Georgia, 365 U.S. 570, the Court held constitutionally invalid a state statute that, while permitting the defendant to make an unsworn statement to the court and jury, prevented defense counsel from eliciting the defendant's testimony through direct examination. Similarly, in Brooks v. Tennessee, 406 U.S. 605, the

> Court found unconstitutional a state law that restricted the right of counsel to decide 'whether, and when in the course of presenting his defense, the accused should take the stand.' Id., at 613. The right to the assistance of counsel has thus been given a meaning that ensures to the defense in a criminal trial the opportunity to participate fully and fairly in the adversary factfinding process."

On the facts of the present case, the opening statement will be a peculiarly important part of "the adversary factfinding process". It will, in fact, be a significant opportunity for Friend's counsel to try to blunt the inevitable harm to him from extraneous evidence as to other defendants. Under these circumstances, the objections of attorney-client privilege, which will presumably be advanced by other defendants, should not be permitted to curtail the opening presentation of Friend's defense. As we held by the Supreme Court in the Herring case, "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free". 422 U.S. at page 62.

The facts presented in Herring involved a closing argument, and the court there left open the question of a constitutional right to argument at other stages of a criminal trial (page 863, n.13). The Second Circuit, however, has held it reversible error to preclude defense counsel, in the opening statement, from a full presentation of what the defense expects to

prove. United States v. Persico, 305 F.2d 534, 537 (1952). There can be no serious doubt that the opening statement, on a particular set of facts, can be fully as important as the summation. The opening statement here is essential to prevent Friend from being submerged, before the commencement of his defense, by a mass of evidence which does not relate to him, but which will inevitably injure him by association.

In a Joint Trial, Defendant Friend Would Be Prejudiced by the Accumulation of Evidence Relating Only to Other Defendants

In defendant Friend's original motion for severance, it was submitted that Friend would be unfairly and irreparably prejudiced, in any joint trial, by the volume of evidence relating only to other defendants. This prediction has now been verified by the lists of exhibits and witnesses which the government has finally submitted in response to the repeated orders of the Court. The government proposes to offer hundreds of witnesses, and thousands of pages of documents, which have no relation to Friend, but which in a protracted jury trial could nevertheless prejudice him gravely by association.

Thus, of the approximately 1700 exhibits so far designated by the government, only 47 purport to be writings by Mr. Friend. Of the remaining exhibits (aside from such corporate documents as minutes and SEC filings), fewer than 25 even mentioned

Mr. Friend. Thus, more than 95% of the huge mass of paper designated by the government does not, on its face, relate to defendant Friend. Of the several hundred witnesses designated by the government, Friend had no contact with the overwhelming majority; in most cases he had literally never heard of them prior to seeing the witness list, or had first heard of them in his capacity as defense counsel before he was notified of his target status.

As set forth in Friend's previous motion, it is well settled that a separate trial should be ordered where substantial prejudice to one defendant will otherwise result from the introduction of evidence relevant only to co-defendants. See, e.g., Bruton v. United States, 391 U.S. 123 (1968); Kelly v. United States, 349 F.2d 720 (2d Cir. 1965), cert. denied 384 U.S. 947; United States v. Gentile, 495 F.2d 626 (5th Cir. 1974). Severance should be directed whenever a defendant demonstrates "that the evidence against his co-defendants is far more damaging than the evidence against him". See McHale v. United States, 398 F.2d 757, 758 (D.C. Cir. 1968), cert. denied 393 U.S. 985.

The Kelly rule was but recently reaffirmed in United States v. Mardian, F.2d (D.C. Cir. October 12, 1976).* There the Court noted:

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* A copy of the Court of Appeals decision in the Mardian case, not yet reported, is attached to this memorandum.

> "Particularly where there is a great disparity in the weight of the evidence, strongly establishing the guilt of some defendants, the danger persists that the guilt will improperly 'rub off' on the others. United States v. Kelly, 349 F.2d 720, 766-769 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966). In Kelly the Court of Appeals for the Second Circuit emphasized that severance is among the most important safeguards available to minimize the risk of prejudice, and it ordered a new separate trial for the one alleged co-conspirator who was disadvantaged by the disproportion in the evidence. Id. at 756. See United States v. Donaway, 447 F.2d 940, 943 (9th Cir. 1971). This court has often expressed its acceptance of the rule announced in Kelly, requiring severance when the evidence against one or more defendants is 'far more damaging' than the evidence against the moving party. United States v. Bolden, 169 U.S.App.D.C. 60, 69, 514 F.2d 1301, 1310 (1975); United States v. Leonard, supra, 100 U.S.App.D.C. at 47, 494 F.2d at 966; United States v. Gambrill, supra, 142 U.S.App.D.C. at 83, 86, 449 F.2d at 1159, 1162; McHale v. United States, 130 U.S.App.D.C. 163, 164, 398 F.2d 757, 758, cert. denied 393 U.S. 985 (1968)."

The Court in Mardian went on to hold that, although the denial of Mardian's first severance motion had not been an abuse of discretion, severance should have been granted when additional factors arose during the course of the trial.

The present case, we submit, is a far stronger one for severance than was presented in Mardian. The principal events in Mardian covered a period of only a few months, although the conspiracy was alleged to have continued until the day of the indictment. In the present case, the "scheme" alleged in the

indictment is claimed to have continued for almost a decade before Friend was employed by the corporate defendants. Further, as appears from an analysis of the government exhibits, discussed above, Friend's connection with the matters in issue is peripheral, and amounts to only a minute fragment of the overall case. Thus, it is significant that, of the hundreds of pieces of advertising and promotional literature which the corporate defendants circulated, the government places its main emphasis on just three -- all of which predated Friend. Under these circumstances, as the Court stated in Mardian, "The 'dangers of transference of guilt' are such that a court should use 'every safeguard to individualize each defendant in his relation to the mass'" (Slip Opinion, page 6, citing Kotteakos v. United States, 328 U.S. 750, 773-4). In the present case, given Friend's peripheral relation to the issues, and the enormous mass of evidence relating to the other defendants, there is no way that he can be sufficiently "individualized" in a joint trial.

Clearly, none of the huge mass of documents relating to other defendants would be admissible against Friend on any theory, unless the government met the burden of proving, inter alia, that a fraudulent scheme existed, and that Friend knowingly and intentionally joined it. See, e.g., United States v. Klein, 515 F.2d 751 (3d Cir. 1975); United States v. Markee, 425 F.2d 1043 (9th Cir. 1970), cert. denied 400 U.S. 847. Such

personal intent, moreover, "is not ascertained by reference to the conduct or statements of another, even though he had knowledge thereof". United States v. Spock, 416 F.2d 165, 173 (1st Cir. 1969). See, also, Phillips v. United States, 356 F.2d 297, 303 (9th Cir. 1965), cert. denied sub nom. Walker v. United States, 384 U.S. 952. However, as the Second Circuit has noted, this presents the court with the "difficult ... intellectual feat of assessing the independent evidence free from the color shed upon it by the hearsay". United States v. Geaney, 417 F.2d 1116, 1120 (1969). This "intellectual feat", difficult at best, would be virtually impossible here where evidence relating to Friend would be a minute fragment of the enormous mass of materials introduced by the government. And, if the Court determines that the requested connection has not been established, the present case would leave no practical remedy except to declare a mistrial. See United States v. Geaney, supra, at 417 F.2d 1120.

It is no answer, on the state of the facts presented by the government's designation of witnesses and exhibits, to argue that the evidence as to other defendants would be admissible in a separate trial of Friend. Such a separate trial would be inevitably much shorter than a joint trial, and the process of evaluating independent evidence aliunde the hearsay would be far more manageable. Further, even on a "subject to connection" basis, the trial court would almost certainly exclude large

quantities of the material which relates only to other defendants. As the Court of Appeals noted in United States v. Mardian, supra (Slip Opinion, p. 9, n.6):

> "In light of our disposition of the case, we need not determine the admissibility of these references [to Mardian] since the question, if it arises on retrial, will appear in a vastly different setting. Even if some references are technically admissible under various exceptions to the hearsay rule, the court is still called upon to exclude evidence 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury * * *' Rule 403, Fed. R. Evid. When Mardian is retried singly, the major focus will be on the period of June and July of 1972. Without the need to introduce evidence against other defendants, the balance between relevance and prejudice of statements made in March and April of 1973 may be substantially altered." [emphasis supplied]

Further, the interest of judicial economy strongly indicates that a severance of Friend, which clearly will be warranted in the light of the government's proposed proof, should take place now rather than after trial begins. As appears from the conflict among defendants, over the attorney-client and councils of defense issues, a joint trial of Friend or the other defendants would be fraught with possibilities of mistrial and reversible error. The time and resources of the Court, as well as the parties, would be best conserved by severing Friend now for a separate trial.

CONCLUSION

For the reasons set forth above, and in the papers submitted in support of the previous motion to sever, it is submitted that the motion should be granted in all respects.

Respectfully submitted,

ROGERS & WELLS
Attorneys for Defendant
Solomon H. Friend
200 Park Avenue
New York, N.Y. 10017
Telephone: (212) 972-7000

Of Counsel:

William R. Glendon
Guy C. Quinlan

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1383

UNITED STATES OF AMERICA

v.

ROBERT C. MARDIAN, APPELLANT

Appeal from the United States District Court for the District of Columbia

(D.C. Criminal No. 74-110)

Argued January 6, 1976

Decided October 12, 1976

David Ginsburg, with whom *David G. Bress*, *Ronald P. Wertheim*, and *Thomas C. Green* were on the brief, for appellant.

Peter M. Kreindler, Counsel to the Special Prosecutor, with whom *Henry S. Ruth, Jr.*, Special Prosecutor at the time the brief was filed, *Peter F. Rient*, *Kenneth S. Geller*, *Maureen E. Gerlin*, *Jay B. Stephens*, and *Judith A. Denny*, Assistant Special Prosecutors, and *Sidney M.*

Glazer, Attorney, Department of Justice, were on the brief, for appellee.

Before BAZELON, *Chief Judge*, and WRIGHT, MCGOWAN, ROBINSON, and MACKINNON, *Circuit Judges*, sitting *en banc*.

Opinion for the court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge*: Robert C. Mardian appeals from his conviction of conspiracy under 18 U.S.C. § 371 (1970). He was tried in the District Court along with H. R. Haldeman, John D. Ehrlichman, and John N. Mitchell, whose appeals we are also deciding today. *United States v. Haldeman*, Nos. 75-1381, 75-1382, 75-1384, & 76-1441. The jury found a conspiracy to obstruct justice and defraud the United States by impeding a grand jury investigation into a break-in at the Watergate Office Building and into other related matters. The basic facts of the case are recited at length in our *Haldeman* opinion and need not be repeated here. A brief summary of the Government's evidence as to Mardian's involvement will suffice.

1. Mardian met with Mitchell, Jeb Magruder, and Frederick LaRue in California on June 17, 1972, the day of the Watergate break-in, to discuss how the Committee to Re-elect the President (CRP) should respond to the incident. Mardian then placed a number of calls in an effort to contact Attorney General Kleindienst and have the burglars released before their identities became known. Tr. 4530-4536, 6562-6565.

2. On June 18 Mardian helped Magruder and LaRue prepare a press release to be issued by Mitchell, disclaiming any CRP tie to the break-in, although by then Mardian knew that Mitchell and Magruder, Director and Deputy Director of CRP, and G. Gordon Liddy, CRP General Counsel, were involved. Tr. 4537-4540, 6565-6569, JA 912.

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. 4537-4540, 6565-

3. On June 19 Mardian was present at a meeting where Mitchell suggested that Magruder destroy Gemstone documents. Tr. 4540-4550, 6570-6573.

4. On June 20 or 21 Mardian and LaRue met with Liddy. After receiving assurances of confidentiality, Liddy described the Gemstone intelligence-gathering program, Mitchell's and Magruder's involvement, and his own role in carrying out the plan. Mardian, in accordance with his promise, did not reveal this information except to Mitchell. Moreover, even after gaining this knowledge, Mardian actively misled Kenneth Parkinson into believing that Liddy was acting on a lark of his own. Parkinson, a co-defendant whom the jury found not guilty, was the lawyer hired by Mardian to serve as trial counsel for CRP in civil suits growing out of the Watergate break-in. Tr. 2816-2817, 4570-4573, 6598-6604, 6655-6659.

5. Mardian told John Dean that Dean could monitor the Government investigation of the break-in most effectively by getting copies of FBI lead sheets, and, although he was no longer a Government official, Mardian himself examined FBI documents during the course of the conspiracy. He also urged Dean to slow down the FBI investigation. Tr. 2830-2831, 2836-2837.

6. Mardian attended meetings where the participants developed a false cover story to explain the $199,000 Magruder had authorized for disbursement to Liddy. Mardian participated at least to the extent of suggesting that the original tale simply would not hold up before the grand jury. Tr. 2759-2763, 4552-4562, 6652-6660.

7. Mardian had some small role in the development of hush money plans. He learned from Liddy on June 20 or 21 of CRP "commitments" to the burglars for legal fees and other expenses, and was present when LaRue assured Liddy that the commitments would be kept. Tr.

4010-4011, 6601-6603. At a meeting on June 24 where possible sources for the money were discussed, Mardian encouraged the others to look to the Central Intelligence Agency (CIA) to provide the funds. Tr. 2728-2730, 6610.

Mardian denied that most of these incidents took place, and for others he offered plausible explanations consistent with his innocence.[1] The evidence was sufficient to go to the jury, but it must be acknowledged that the proof as to most of these incidents was not as strong as the evidence relating to the other three defendants who were convicted. For example, only Jeb Magruder placed Mardian with any confidence at the June 19 meeting at the precise time when Mitchell directed Magruder to destroy Gemstone documents. Tr. 4548-4550. LaRue was there but could not confirm Mardian's presence at the crucial time. Tr. 6572-6573. Dean too was uncertain about when Mardian left, but in any event Dean heard no suggestion that documents be burned. Tr. 2673-2674. Under cross-examination even Magruder expressed some uncertainty as to when Mardian departed. Tr. 5215. Mardian insisted he left early to begin making phone calls to find a trial lawyer for the Watergate civil suits. Tr. 10746-10747.

Mardian did, however, admit the occurrence of one major incident—the June 20 or 21 meeting with Liddy. He did hear Liddy's story in its entirety, and Mardian

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[1] For example, Mardian testified that he had never urged the conspirators to look to the CIA to help meet the burglars' money demands. Tr. 10799. He suggested, however, that he might conceivably have observed in passing that if these were CIA people the CIA should take care of them. And he recited substantial information then available to him that did tend to indicate CIA involvement. Tr. 10799-10807, 10890. It was in any event undisputed that the burglars all had prior CIA connections, and that they were all carrying false identifications supplied by the CIA at the time of their arrests.

even agreed that he had subsequently been "less than honest" in his relationship with Parkinson concerning Liddy's role. Tr. 11014. He defended these actions, however, on the ground that he was convinced his conduct was compelled by the ethical canons governing the actions of a lawyer serving, as he was, as "in house" counsel to a corporate client, Parkinson being "outside" counsel hired for a limited purpose. We shall have more to say about this defense in due course.

Mardian principally contends that the District Court erred in failing to sever his trial from that of the other defendants. Under the particular circumstances presented we agree and remand for a new trial.

I. SEVERANCE

A motion for severance, *see* Rule 14, FED. R. CRIM. P.,[2] is addressed to the sound discretion of the trial court, and a ruling denying severance will not be reversed unless there is shown an abuse of that discretion. *Opper v. United States*, 348 U.S. 84, 95 (1954); *United States v. Peterson*, —— U.S.App.D.C. ——, ——, 522 F.2d 661, 666 (1975); *United States v. Leonard*, 161 U.S.App.D.C. 36, 46, 494 F.2d 955, 965 (1974); *United States v. Gambrill*, 142 U.S.App.D.C. 72, 83, 449 F.2d 1148, 1159 (1971); *United States v. Wilson*, 140 U.S.App.D.C. 220, 226-228, 434 F.2d 494, 500-502 (1970). In applying this well established rule, however, courts have always kept in mind the problems inherent in trial of conspiracy cases involving numerous defendants. The Supreme Court has

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[2] Rule 14 provides in relevant part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. * * *

long recognized that in such cases "the liberal rules of evidence and the wide latitude accorded the prosecutor may, and sometimes do, operate unfairly against an individual defendant * * *." *Glasser v. United States*, 315 U.S. 60, 76 (1942). The "dangers of transference of guilt" are such that a court should use "every safeguard to individualize each defendant in his relation to the mass." *Kotteakos v. United States*, 328 U.S. 750, 774, 773 (1946). *See Blumenthal v. United States*, 332 U.S. 539, 559-560 (1948).

Particularly where there is a great disparity in the weight of the evidence, strongly establishing the guilt of some defendants, the danger persists that that guilt will improperly "rub off" on the others. *United States v. Kelly*, 349 F.2d 720, 756-759 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966). In *Kelly* the Court of Appeals for the Second Circuit emphasized that severance is among the most important safeguards available to minimize the risk of prejudice, and it ordered a new separate trial for the one alleged co-conspirator who was disadvanged by the disproportion in the evidence. *Id.* at 756. *See United States v. Donaway*, 447 F.2d 940, 943 (9th Cir. 1971). This court has often expressed its acceptance of the rule announced in *Kelly*, requiring severance when the evidence against one or more defendants is "far more damaging" than the evidence against the moving party. *United States v. Bolden*, 169 U.S.App.D.C. 60, 69, 514 F.2d 1301, 1310 (1975); *United States v. Leonard*, *supra*, 160 U.S.App.D.C. at 47, 494 F.2d at 966; *United States v. Gambrill*, *supra*, 142 U.S.App.D.C. at 83, 86, 449 F.2d at 1159, 1162; *McHale v. United States*, 130 U.S.App.D.C. 163, 164, 398 F.2d 757, 758, *cert. denied*, 393 U.S. 985 (1968).[3]

[3] The Government argues, citing *United States v. Wilson*, 140 U.S.App.D.C. 220, 228 & n.15, 434 F.2d 494, 502 & n.15 (1970), that *Kelly* applies only where "incriminating evidence

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Mardian made out a fairly strong case under the *Kelly* doctrine when he moved for severance before trial. JA 318-325. He pointed out that, unlike the other six original indictees,[3] he had been named only in the conspiracy count. All the others were named at least in Count 2, charging the substantive offense of obstruction of justice; four were accused as well of one or more individual counts of perjury. Count 1, charging them all with conspiracy, alleged 45 overt acts. Of these only five involved Mardian. And, most significantly, none charged Mardian with any activity after July 21, 1972, roughly one month after the break-in, although it was alleged that the conspiracy continued up to the date of the indictment, March 1, 1974.

In fact, it developed at trial that Mardian had sought to be transferred back to regular campaign duties beginning shortly after he was assigned (on June 19) to serve as counsel for CRP with respect to the civil suits growing out of Watergate. On July 4 or 5, 1972, having been rebuffed in his earlier attempts at reassignment, he delivered an ultimatum to Mitchell insisting he would leave CRP totally unless granted a transfer. Mitchell acquiesced, and Mardian ceased his role as CRP counsel for Watergate matters in mid-July. The Government does not contend that he had any substantial involvement in the conspiracy after July 1972, although it does insist —and we agree—that Mardian's terminating active par-

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that was inadmissible against the appellant was admitted against a co-defendant." *Id.* Even if *Kelly* is thus limited, here Mardian claims he was subjected to such evidence. *See* note 6 *infra* and accompanying text.

[3] As explained in our *Haldeman* opinion, only five of the original seven named in the indictment went to trial together. The charges against Charles Colson were dropped upon his guilty plea in another case, and the case against Gordon Strachan was severed and ultimately dismissed. The jury then found Parkinson not guilty of the crimes charged against him.

ticipation did not amount to withdrawal.[5] It is accepted, then, that if Mardian was a conspirator he, unlike the other convicted conspirators, was active only for a few weeks.

As the trial developed it became even clearer that a substantial part of the testimony would focus on events after Mardian ceased active participation. Much of the most damaging testimony related to the spring and summer of 1973, a time when the cover-up was coming unraveled. During March and April of that year many of the conspirators, especially Dean, Magruder, and LaRue, began telling all they knew to the prosecutors. Haldeman and Ehrlichman, and to a lesser extent Mitchell, were plotting "scenarios" in the White House to cope with the impending collapse of the cover-up. On April 30 Haldeman and Ehrlichman resigned from their White House posts. Then in June the Senate Select Committee began its hearings and thereby furnished the setting for many of the perjurious statements charged against Mardian's co-defendants. Mardian had long since left Washington and ceased active participation.

Moreover, tape recordings of conversations between conspirators played an undeniably important role in the prosecution's case. Twenty-four of the 30 tapes the prose-

[5] Had Mardian withdrawn, the declarations of co-conspirators uttered after the date of his withdrawal would not be admissible against him. *See Lutwak v. United States*, 344 U.S. 604, 617-618 (1953). But withdrawal requires "either the making of a clean breast to the authorities, * * * or communication of the abandonment in a manner reasonably calculated to reach co-conspirators." *United States v. Borelli*, 336 F.2d 376, 388 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965). *See Hyde v. United States*, 225 U.S. 347, 369 (1912). Mardian's actions do not satisfy this test. *Cf. United States v. Nowak*, 448 F.2d 134, 139 (7th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972) (resigning as lawyer did not constitute withdrawal from conspiracy).

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cution played presented conversations that occurred during March and April of 1973, further underscoring the significance of that time period. Mardian was not a participant in any of the 30 taped conversations. His name was mentioned five times on the tapes played to the jury. He challenged in timely fashion each of the references as inadmissible and moved to have them deleted, supporting his motion with a lengthy memorandum of points and authorities. JA 638. The court did delete a few references, but the five challenged here remained.[6]

Not all of this information developed during the trial was available to the District Court at the time it considered Mardian's pretrial motion for severance.[7] In denying the motion the court cited the "general rule" that defendants jointly indicted should be tried together. *United States v. McDaniel*, —— U.S.App.D.C. ——, ——, 538 F.2d 408, 410 (1976); *Brown v. United States*, 126 U.S.App.D.C. 134, 139, 375 F.2d 310, 315, *cert. denied*, 388 U.S. 915 (1967). And there are indeed strong interests favoring joint trials, particularly the desire to

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[6] In light of our disposition of the case, we need not determine the admissibility of these references since the question, if it arises on retrial, will appear in a vastly different setting. Even if some references are technically admissible under various exceptions to the hearsay rule, the court is still called upon to exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury * * *." Rule 403, FED. R. EVID. When Mardian is retried singly, the major focus will be on the period of June and July of 1972. Without the need to introduce evidence against other defendants, the balance between relevance and prejudice of statements made in March and April of 1973 may be substantially altered.

[7] Mardian did raise many of the same points in a motion for a new trial filed Jan. 16, 1975. JA 839-845. The court denied the motion. JA 868-869, *United States v. Mitchell*, 389 F.Supp. 917, 921-922 (D. D.C. 1975).

conserve the time of courts, prosecutors, witnesses, and jurors. *See United States v. Hines*, 147 U.S.App.D.C. 249, 266, 455 F.2d 1317, 1334, *cert. denied*, 406 U.S. 969 & 975 (1972).

Mardian had made a substantial pretrial showing of possible prejudice requiring severance under the *Kelly* doctrine. But based on the information then before the court, that showing was not so compelling that it was clear Mardian's interest in a separate trial outweighed these interests favoring joinder. We are therefore unable to say that this initial denial of severance constituted an abuse of discretion. Nonetheless, Mardian's *Kelly* showing remained a substantial factor to be kept in mind as the trial progressed. And the court, in denying the motion, did take specific note of its "continuing duty at all stages of the trial to grant a severance if prejudice does appear." *Schaffer v. United States*, 362 U.S. 511, 516 (1960). *See United States v. Wilson*, *supra*, 140 U.S.App.D.C. at 225-226, 434 F.2d at 499-500; *Sims v. United States*, 132 U.S.App.D.C. 111, 112 n.1, 405 F.2d 1381, 1382 n.1 (1968).

Such an occasion arose two weeks into the trial of the case, when Mardian's lead counsel, Mr. David Bress, became ill and was forced to enter a hospital for surgery. At a hearing on November 1, 1974, Mardian's co-counsel, Mr. Thomas Green, told the court that Bress would be unavailable for at least six weeks. On Mardian's behalf he moved for severance a second time. He emphasized that a defendant has a cherished right to employ counsel of his choice,[8] and pointed out that he personally had not been retained by Mardian. As an associate in Bress'

[8] *See, e.g., Crooker v. California*, 357 U.S. 433, 439 (1958); *Chandler v. Fretag*, 348 U.S. 3, 9-10 (1954); *Releford v. United States*, 288 F.2d 298, 301 (9th Cir. 1961); *Lee v. United States*, 98 U.S.App.D.C. 272, 274, 235 F.2d 219, 221 (1956).

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firm, he had come in on the decision of Mr. Bress and had really only become acquainted with Mardian at the commencement of the trial. JA 614-616. Mardian addressed the court and stressed the importance of the case to him and the care he had taken in selecting Bress. JA 616-618. The Government did not oppose the motion. It took this position for personal reasons stemming from a long-standing friendship between Mr. Neal, head of the prosecution team, and Mr. Bress, but indicated that it did not regard severance as legally required. JA 618-620.

The court denied the motion for severance. It expressed confidence in the ability of Mr. Green to take over for Mr. Bress; he had had ample trial experience, including three years as an Assistant United States Attorney. The court was also concerned about having to grant similar continuances to other defendants should their lead counsel become ill. JA 620-626.[9]

This ruling was in error. The District Court's action might well have been acceptable if the only real question before it were the competency of Mr. Green to continue

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[9] Later, in denying Mardian's post-trial motion for a new trial, the court amplified on the grounds for its ruling. It referred to the well established rule that a defendant's right to an attorney of his choice is "not so absolute as to permit disruption of the fair and orderly administration of justice when another competent attorney is available to continue the defense. See generally *Lofton v. Procunier*, 487 F.2d 434, 435 (9th Cir. 1973); *United States v. Harrelson*, 477 F.2d 383, 384 (5th Cir.), *cert. denied*, 414 U.S. 847 (1973); *McGill v. United States*, 348 F.2d 791, 794-95 (D.C. Cir. 1965)." JA 869, 389 F.Supp. at 921-922. The rule is undeniably sound but, as we develop more fully in text, the District Court failed to take adequate account of the strength of Mardian's interest in light of the *Kelly* showing he had made in connection with his pretrial severance motion. Likewise, the court overestimated the degree of disruption, given the prosecutor's determination not to oppose the Nov. 1 motion.

Mardian's representation. Indeed, no one has contended on appeal that his services were in any way inadequate.

But more was at stake, and the court's stated ground for denial—concern about similar problems with other defendants' lead counsel—was inadequate to justify the result. In the first place, it was absolutely clear that Mardian bore no responsibility for the potential disruption; Bress' illness was *bona fide* and unforeseeable.[10] The same situation was most unlikely to occur with respect to other defendants. Even if it did, it would have arisen under totally different circumstances. Two factors made Mardian's motion unique and should have prompted the court to sever, notwithstanding the availability of Mr. Green to continue the defense.

First, Mardian's November 1 motion must be considered against the backdrop of the solid *Kelly* showing he had made before trial.[11] The evidence against Mardian was not as strong as that marshalled against his co-defendants. With the possible exception of Parkinson (who was ultimately acquitted), no other defendant could claim the same disproportion in the evidence. Where the

[10] *Cf. Giacalone v. Lucas*, 445 F.2d 1238 (6th Cir. 1971), *cert. denied*, 405 U.S. 922 (1972). There the question was whether the District Court should have granted a continuance until the defendant's chief counsel was released from the hospital. The court listed the factors to be considered, including significantly "whether the delay seems to be for legitimate reasons, or whether it is purposeful and dilatory * * *." *Id.* at 1240.

[11] In moving for severance at the Nov. 1 hearing, Mardian's counsel emphasized: "I would also like the Court to consider all of the other grounds which we have raised for severance heretofore in our previous pleadings * * *." JA 615. It is in any event incumbent on the court to consider a motion for severance "in light of the other elements present in the case * * *." *United States v. Gambrill*, 146 U.S.App.D.C. 72, 87, 449 F.2d 1148, 1163 (1971).

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evidence is of this character it is especially important that the defendant be granted every safeguard.[12] The accused under such circumstances has a special interest in representation by experienced counsel of his own choice in whom he can have the kind of confidence that grows from long-standing acquaintance—at least if his choice can be honored without undue disruption.

The second factor thus assumes the highest importance, for it demonstrates that severance would not have caused undue disruption: The Government did not oppose Mardian's motion. Although the prosecution took this position on personal grounds, its stance meant, at the very least, that the prosecution saw no significant problems if it had to try Mardian's case separately. Put another way, it saw no compelling interest in continued joinder.

Naturally, in passing on a motion for severance the court must consider not only the burdens on the prosecution, but also the burdens any new trial would place on the court, the witnesses, and a new jury panel. But here the prosecution's position was entirely consistent with the posture of the case at that point. Only two weeks of a three-month trial had elapsed. The limited period of Mardian's active involvement, if any, in the conspiracy also suggested a minimal burden to retry him; it would likely require only a short trial and a fairly small number

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[12] In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial * * *.

Glasser v. United States, 315 U.S. 60, 67 (1942). *Glasser* too was a case where a defendant charged with conspiracy contended he had been denied proper assistance of counsel of his choice; the Court reversed as to that defendant.

of witnesses. In such a situation, when the prosecution indicates that in its view a separate trial would cause no undue disruption, that prosecutorial judgment is a substantial factor that affects the balance between joinder and severance. In the particular circumstances of this case, Mardian's interest in being represented by counsel of his own choice, combined with the disproportion of the evidence to his potential prejudice, necessitated severance. On this ground we reverse and remand for a new trial.

II. Instructions on Mardian's Theory of Defense

What we have said above suffices to dispose of the case. One of Mardian's other assignments of error requires discussion, however, because the question is likely to arise upon retrial.

Mardian claims that the District Court failed to instruct the jury adequately on his theory of defense based on the fact that he was acting as CRP's lawyer during June and July of 1972. The defense is relevant to two incidents portrayed in the Government's case. First, and most important, after pledging qualified confidentiality based on his role as CRP's lawyer, Mardian learned from Liddy on June 20 or 21 the details of Gemstone and the break-in. Thereafter, he—at a minimum—did not disclose this information to Parkinson, a lawyer with whom he was working to defend CRP in the Watergate civil suits for damages based on the break-in; to some extent he actively misled Parkinson. Mardian basically admitted these facts. Therefore it was crucial to his case to show that he thought he was compelled to act as he did by the ethical obligations of a lawyer. He argues that the court should have instructed the jury in some detail as to the complexities of the attorney-client privilege in an organizational setting. In his view he was serving as "inside" counsel to CRP while Parkinson was "outside" counsel hired for a limited purpose. Inside counsel, Mardian

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argues, "plainly does not have the same co-equal relationship with outside counsel that two law partners normally have with each other." Mardian br. at 92. An instruction along these lines would apparently support Mardian's belief that he could not be fully candid with Parkinson.

The second incident involved Mardian's alleged participation in meetings at which evolved Magruder's cover story for the $199,000 given to Liddy—a false story developed in anticipation of Magruder's appearance before the grand jury. Here Mardian's "legal obligations" defense was less important, for he denied any role in developing the cover story. He did agree, however, that he had often met with Magruder and others in an effort to find out just how much money Magruder had authorized for Liddy. He did this, he contended, in pursuance of his obligation to learn the facts. Tr. 10771-10778. Mardian asserts that the court should have instructed explicitly on a lawyer's obligation to resolve doubts about a client's state of mind in favor of his client. Such an instruction might throw light on his discussions with Magruder, and it would also relate to the reasons for Mardian's repeating some of the Magruder explanations to Parkinson, notwithstanding his doubts as to their accuracy.

We reject these contentions. The court's instruction to the jury[13] was completely adequate to present Mar-

[13] That instruction reads in full:

> Two Defendants, Messrs. Mardian and Parkinson, claim to have participated in or directed the legal representation of the Committee to Re-elect the President in response to a civil suit filed by the Democratic National Committee. This fact may have some bearing on the specific intent of these two Defendants. In weighing and evaluating the evidence relating to the element of intent you should consider whether the actions taken by each of

dian's theory. Mardian's claim is fundamentally a claim that he acted without criminal intent in connection with these two alleged episodes. The jury was not called upon in this case to determine whether the attorney-client privilege in fact did prevent Mardian from disclosing to Parkinson what Liddy had told him. It had only to deter-

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these Defendants were undertaken pursuant to good faith legal representation or whether they were un[der]taken with a criminal intent and in furtherance of the conspiracy charged.

Let me point out that a lawyer has a duty to become fully informed of all facts of the matter he is handling.

The relationship between a lawyer and his client is absolutely confidential, requiring a high degree of trust and good faith. An attorney is ethically required to preserve the confidences and secrets of his clients. This is the basis of the so-called attorney-client privilege.

It is well settled, however, that this attorney-client privilege which we are talking about does not extend to communications between an attorney and client which are in aid of or in furtherance of a crime or fraud. The privilege does not apply to shield such criminal conversations.

What all this boils down to is a question of intent. If you find, based on the evidence and what I have told you about the duties and limits on the duties of a lawyer, that either or both of these Defendants, that is, Mr. Mardian and Mr. Parkinson, either one or both, lacked the criminal intent to join and further the conspiracy charged in Count One because he was merely doing his jo[b] as a lawyer, you must find that Defendant or both Defendants if you so find, not guilty of Count One. But if you find that either Mr. Parkinson or Mr. Mardian, or both of them, were acting with ... intent to participate in the alleged conspiracy, then the fact that he happened to be active as a lawyer also is no defense, and he should be found guilty provided all the other elements are also established beyond a reasonable doubt.

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mine whether Mardian believed he was thus constrained and, if so, whether Mardian's belief was of such a character that it meant he was not acting with specific intent to advance the purposes of the conspiracy. Indeed, Mardian's own counsel argued this point forcefully during a colloquy at the bench over a certain line of questioning being pursued by the prosecution concerning the attorney-client privilege: "The issue here is *what was Mr. Mardian's state of mind*, not whether someone else's statement of the attorney-client privilege comports with the facts [the prosecution] attempts to bring out." Tr. 10926 (emphasis added).

The court's instruction quite properly focused on the question of intent. It begins:

> Two defendants, Messrs. Mardian and Parkinson, claim to have participated in or directed the legal representation of the Committee to Re-elect the President in response to a civil suit filed by the Democratic National Committee. This fact may have some bearing on the specific intent of these two defendants. * * *

Tr. 12370. And again, after explaining the law governing an attorney's obligations, the court repeated: "What all this boils down to is a question of intent." Tr. 12371.

Moreover, the court did not leave the jury at sea with respect to the governing law. In a manner entirely favorable to Mardian (and drawing upon language from Mardian's proposed instruction, JA 726-731), the court stressed that "a lawyer has a duty to become fully informed of all facts of the matter he is handling," and that "[a]n attornney is ethically required to preserve the confidences and secrets of his clients." Tr. 12370. The court's further instruction that the attorney-client privilege does not extend to communications "which are in aid of or in furtherance of a crime or fraud" accu-

rately states the law and cannot be a ground for complaint. *See Clark v. United States*, 289 U.S. 1, 15 (1933); *Alexander v. United States*, 138 U.S. 353, 358-360 (1891); *United States v. Rosenstein*, 474 F.2d 705, 715 (2d Cir. 1973).

What was said was enough to present the question to the jury with proper guidance. The court was not obliged to go further and deliver Mardian's lengthy and complicated instruction verbatim. In the first place, Mardian's proposal was at some points misleading in its statement of the governing law.[14] It is not error to refrain from giving a misleading requested instruction. *See McGuinn v. United States*, 89 U.S.App.D.C. 197, 199, 191 F.2d 477, 479 (1951); *United States v. Leach*, 427 F.2d 1107, 111
(1970); *United*
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[14] For example, Mardian's proposed instruction could easily mislead the jury on the constraints against disclosure that applied to Mardian's relationship with Parkinson:

> Unless a client explicitly gives his consent, a lawyer is prohibited even from disclosing the confidential information of his client to other lawyers handling related matters.

JA 728 (footnote omitted). Mardian purports to draw this principle from AMERICAN BAR ASSOCIATION, CODE OF PROFESSIONAL RESPONSIBILITY, Canon 4, EC 4-2 (1971). That provision states, however, that "[u]nless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm." It is true that Mardian and Parkinson were not partners in the same firm, but the analogy for purposes of the disclosures at issue here is quite strong. Mardian nonetheless persists in his claim that a different sentence of EC 4-2 governs: "[I]n the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter * * *." This sentence might apply if Liddy were Mardian's client, for it was only Liddy who insisted on complete confidentiality and never waived the privilege. But CRP, not Liddy, was Mardian's client, and there was no evidence that CRP did not consent to associating Parkinson in the full Watergate matter.

[15] *See, e.g.*, Tr
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F.2d 1107, 1112 (1st Cir.), *cert. denied*, 400 U.S. 829 (1970); *United States v. Kelly*, *supra*, 349 F.2d at 759. More importantly, the instruction actually delivered, in conjunction with the healthy opportunity given to Mardian to argue his theory to the jury and to speak of it during his testimony,[15] presented Mardian's theory in sufficient detail, yet avoided encumbering the jury with unnecessary complications.[16] *Cf. United States v. Anderson*, 165 U.S.App.D.C. 390, 409, 509 F.2d 312, 331 (1974), *cert. denied*, 420 U.S. 991 (1975). The District Court's treatment of this defense was entirely acceptable.

For the reasons stated in Part I of this opinion, the conviction is reversed and the case is remanded for a new trial in accordance with this opinion.

Reversed and remanded.

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[15] *See, e.g.*, Tr. 2506-2507, 2521, 2543, 2548 (opening statement); 12153, 12156-12157, 12164-12165, 12175-12176 (closing argument); 10655, 10750-10752, 10762, 10779-10780, 10920, 11019 (Mardian's testimony).

[16] For similar reasons the District Court did not abuse its discretion in denying Mardian's counsel permission to read ABA Canon 4, EC 4-2, *supra* note 14, during closing argument. Mardian did not try to use this canon during his presentation of the case, nor did he contend that he specifically relied on it during 1972 as the basis for his decision not to reveal Liddy's disclosures to Parkinson. Since the question for the jury was fundamentally a question of Mardian's intent, and since the jury did not have to pass on the intricacies of a lawyer's actual ethical obligations, we think the court acted within the scope of its duty to exclude matters that might "tend to confuse the jury." *United States v. Sawyer*, 143 U.S.App.D.C. 297, 299, 443 F.2d 712, 714 (1971). *See United States v. Bearden*, 423 F.2d 805, 813 (5th Cir.), *cert. denied*, 400 U.S. 836 (1970) (defense counsel not entitled to read lengthy statute to jury).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
-against-	:	S 76 Cr. 644 (CMM)
AMREP CORPORATION, et al.,	:	
Defendants.	:	

MEMORANDUM OF DEFENDANT FRIEND IN SUPPORT OF MOTION FOR ACQUITTAL, OR, ALTERNATIVELY, FOR SEVERANCE

Preliminary Statement

This memorandum supports our motion on behalf of the defendant Friend for a judgment of acquittal pursuant to Fed.R. Crim.P. 29(a), or, alternatively, for severance of the trial as to him pursuant to Fed.R.Crim.P. 14.

As will appear, the record indicates that a judgment of acquittal as to Mr. Friend is required because, plainly, "the evidence is insufficient to sustain a conviction" upon the offenses charged against him (Rule 29(a)). The standard applicable to this determination is, of course, the Curley rule, adopted by the Second Circuit in United States v. Taylor, 464 F.2d 240, 243 (2d Cir. 1972). A judgment of acquittal must be entered where

there is "no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt" (id). As we shall show, not only is there no evidence which would permit a conclusion of guilt as to Mr. Friend beyond a reasonable doubt, but what evidence there is plainly shows the contrary.

The paucity of proof as to Mr. Friend is apparent even upon a quick summary of the record. Thus, he did not join AMREP until 1970, some nine years after the origin of the alleged scheme. Accordingly, he had nothing to do with the original acquisition of land at Rio Rancho; the decision to subdivide and to sell the land as home sites; the creation of the exchange privilege and other contractual provisions; or the creation of the mailing sales program and dinner party sales concept or sales techniques. He had no financial stake, through any substantial stock interest or otherwise, in the company. He was not a "controlling person", nor was he a member of the company's Executive Committee. All this is indisputably clear from the record.

It is equally clear from the record that Mr. Friend had nothing to do with the creation or implementation or execution of sales, marketing or advertising policy, which are the crux of this case. What the evidence does show is that Mr. Friend acted as a lawyer in his role as General Counsel, and, in that capacity, engaged continually in a good-faith effort to ensure that his client in this closely regulated business obeyed the law, treated its customers fairly, and in every way lived up to its promises.

Further, since the overwhelming bulk of the government's evidence has absolutely nothing to do with Mr. Friend, a severance as to him is indicated. Indeed, over half of the "victims" whom the government called as witnesses had made their initial purchases at dinner parties years before Mr. Friend joined AMREP. Obviously, there could be no connection between Mr. Friend and any alleged fraud of those purchasers. Much of the remaining evidence also concerned events which either predated Mr. Friend or were unrelated to him. In the pretrial stages of this case, the prosecution in effect conceded that there would be insufficient evidence in a trial against Mr. Friend alone, thus underscoring the patent prejudice to him of a joint trial and, accordingly, the necessity for a severance.* In this connection we also note that defense counsel Fleming confirmed, upon his review of Mr. Friend's Grand Jury testimony, that it was exculpatory, not inculpatory, of him. Thus counsel concluded that the only possible reason for Friend's presence in this case was a misguided effort by the government to aid it in convicting the other defendants (10/21/76, p. 25).

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* Assistant United States Attorney Devorkin stated:

> "There is no way in this case, I submit, that Friend could have been guilty of a crime or guilty of fraud, knowingly defrauding people, if the other people are not guilty of that. It is inconceivable . . . ." (10/21/76, Tr. p. 74).

In the absence of a judgment of acquittal, allowing the jury to weigh Mr. Friend's guilt or innocence in the same balance which contains a mass of evidence unrelated to him cannot help but give rise to unfair prejudice. A finding that Mr. Friend is sufficiently "connected" with the alleged scheme would not remove this prejudice, for the jury would still have to find an independent and specific knowledge and intent to defraud on the part of Mr. Friend, without considering evidence relating solely to the knowledge of others. The probability of an improper "rub off" or "transference of guilt" to Mr. Friend in these circumstances is so great that, we suggest, no amount of precautionary instructions could suffice to remove it. In the absence of a judgment of acquittal, therefore, severance should be granted. E.g., United States v. Kelly, 349 F.2d 720, 756-59 (2d Cir. 1955), cert. denied, 384 U.S. 947 (1966); United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970).

The Evidence

While the bulk of the government's proof in this case is enormous, the amount relating to Mr. Friend is de minimus. Of 400 exhibits admitted into evidence, less than 25 concern Mr. Friend.* These documents will be considered in the context of

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* GX 409A, 418, 527, 584, 586, 629, 681, 732, 813; DX CY. Also, portions of the minutes of meetings of AMREP's Board of Directors.

our discussion infra. Of the 46 witnesses who testified, only four even mentioned Mr. Friend (Mandel, Zaknich, Potter and Perlmutter), and that testimony comprises less than 20 out of nearly 6,000 pages of trial transcript. Three of those witnesses added virtually no substantive evidence to the record as to Mr. Friend. Mandel merely stated that Mr. Friend was with AMREP in August 1970, when Mandel left the company (Tr. 907-08). Zaknich stated simply that Mr. Friend had been brought into AMREP as its counsel and, subsequently, had become a vice president, and that he had seen Mr. Friend at Rio Rancho on possibly one or two occasions (Tr. 1055-57). Potter testified merely that Mr. Friend would occasionally drop in and out of meetings of Regional Sales Managers (Tr. 2291-94).

Perlmutter's testimony was no more probative of the government's case with respect to Mr. Friend. That testimony, to the extent it is relevant, will be considered below. Suffice it here to say that Perlmutter, an executive of AMREP who had been immunized by the government, described Mr. Friend as being dedicated, and testified that he had never seen or heard Mr. Friend direct anyone to do anything but cut a perfectly square corner. (Tr. pp. 3489 , 3507).

The only other evidence concerning Mr. Friend comprises the excerpts from his lengthy Grand Jury testimony, which the government carefully culled out, snipped, rearranged, and then

read into the record. These excerpts, which constitute a total of only 20 out of approximately 1,200 pages of Mr. Friend's Grand Jury testimony, not only fail to establish the government's case as to Mr. Friend, but, when considered against the background of all the other proof admitted into evidence, plainly establish Mr. Friend's innocence.

Indeed, to the extent the record contains any evidence at all as to Mr. Friend, it confirms, as it will appear, that he had no knowledge of any alleged scheme to defraud and certainly had no intent to join it, if it existed at all. Further, the evidence completely disproves the government's contention that Mr. Friend supposedly acted with "reckless disregard" by purportedly "closing his eyes" to allegedly obvious elements of the purported scheme.

As will be discussed, the record shows a consistent pattern of Mr. Friend's acting as a careful lawyer advising his client either to eliminate or change the very statements which the government now claims constituted the basis of the supposed fraudulent scheme. In fact, the government, in its attempt to prove a case against Mr. Friend, offered into evidence facts which, as both defense counsel and this Court noted at the time,* are clearly exculpatory of him. Having so offered the evidence, the government, of course, is bound thereby. See, Artmoore Co. v. Dayless Mfg Co., 208 F.2d 1, 5-6 (7th Cir. 1953), cert. denied,

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* Tr. p. 5303.

347 U.S. 920 (1954). This may be one of the few instances where the government has not only failed to prove the alleged guilt of a criminal defendant but, instead, has succeeded in proving, on its own case, his innocence.

Legal Prerequisites

Specific and actual intent to defraud is, of course, a fundamental prerequisite to a conviction upon a charge of mail fraud. See, e.g., Phillips v. United States, 356 F.2d 297, 303 (9th Cir. 1965), cert. denied sub nom. Walker v. United States, 384 U.S. 952 (1966), wherein the court reversed a conviction of mail fraud in connection with the sale of lots in a land subdivision. Noting that "nothing less than personal knowledge will do . . ." to establish the necessary intent, the court went on to hold:

> "[S]o-called 'constructive' notice or knowledge of a circumstance, based upon the actual knowledge of a co-conspirator, agent or employee, has no tendency, circumstantially or otherwise, to prove criminal intent." 356 F.2d at 303.

Similarly, the court in Windsor v. United States, 384 F.2d at 535, 536-37 (9th Cir. 1967), reversed the conviction of an attorney upon charges of mail fraud relating to land sales, because his knowing participation therein had not been proven. Indeed, the court in Windsor refused to impute the requisite intent to join a mail fraud scheme, even though, as pointed out by

the dissent (384 F.2d at 539), the appellant not only owned a one-fourth interest in the enterprise but had also been appointed President thereof. See also United States v. Spock, 416 F.2d 165, 173 (1st Cir. 1969).

As the Supreme Court has stated in speaking of the proof necessary for charges of conspiracy: "Without the knowledge, the intent cannot exist," and "to establish the intent, the evidence of knowledge must be clear, not equivocal." Direct Sales v. United States, 319 U.S. 703, 711 (1943). See also Ingram v. United States, 360 U.S. 672, 677-80 (1959) wherein the court applied precisely that principle in reversing the convictions of two of defendants who had been indicted and tried for conspiracy to evade federal taxes imposed upon lottery operations.

The Second Circuit has also confirmed that, where the crime charged requires specific intent (as does mail fraud), that element must be proven directly, and not by imputation from others. United States v. Tavoularous, 515 F.2d 1070 (2d Cir. 1975). Reversing the defendants' conviction for illegal possession of United States Treasury bills known to have been stolen from a bank, the Court in Tavoularous stated:

> "The district court apparently held that, if any one defendant had the requisite knowledge, it could be imputed to the other defendants for purposes of the conspiracy count. Tr. 679-80. This is an erroneous statement of legal principle. Where a substantive offense requires

> specific knowledge, that same knowledge must be established before a defendant can be found to be a member of a conspiracy to commit that offense." 515 F.2d at 1074

In sum, the government must prove, inter alia, that Mr. Friend had an actual, specific knowledge and intent to defraud, and this cannot be established by attempting to impute to him the knowledge or intent of others.*

While the Second Circuit has also held that knowledge may be established by proof of "reckless disregard", that court has made equally clear that proof of "reckless disregard" requires evidence of "willful blindness to the existence of a fact," i.e., making a statement or counseling others to make it "in the face of obvious indications of which [the defendant] is aware that those assertions are not true." United States v. Sarantos, 455 F.2d 877, 881 (2d Cir. 1972). It is not the law that ". . . an attorney must investigate 'the truth of his client's assertions' or risk going to jail"; rather, a "conscious purpose to avoid learning the truth" must be proven (id). Indeed, a jury cannot convict if they conclude that the defendant actually believed the truth of the statements. United States v. Bright, 517 F.2d 584 (2d Cir. 1975).

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* The same legal standards would apply if Mr. Friend were claimed to have aided and abetted the alleged scheme, since such a charge also requires specific intent. E.g., United States v. Docherty, 468 F.2d 989, 992-93 (2d Cir. 1972); United States v. Short, 593 F.2d 1170, 1172 (9th Cir.), cert. denied, 419 U.S. 1000 (1974).

Nevertheless, the government, in its trial brief dated December 6, 1976, has contended (pp. 8-11) that, even if neither direct knowledge nor "reckless disregard" can be established as to Mr. Friend, he may nevertheless be found guilty because, the government claims, he was under a purported "duty to investigate". This argument, through which the government apparently seeks to stretch civil law concepts of "fiduciary duty" into a criminal law doctrine, illustrates how far the government must reach in its attempt to find some semblance of a case against Mr. Friend. The argument, if it is even cognizable at all, has no application here.

Thus, aside from civil decisions, the government quotes (p. 10) an inapplicable dictum from United States v. Andreadis, 396 F.2d 423, 430 (2d Cir. 1966), and cites other cases in all of which the courts found significant, substantial evidence that the accused either had knowledge of the alleged falsity or of facts which clearly indicated such falsity. In effect, the cases add nothing to the "reckless disregard" standard already discussed. Even more importantly, the cases involved individuals such as Andreadis who were clearly in control of the business entity wherein the alleged fraud had occurred. This Court succinctly summarized the law during a colloquy in which the prosecutor was arguing the government's position of derivative criminal

liability from corporate office. As this Court then stated: "You use the word 'control,' and that is the key" (Tr. p. 5627).

Indeed, as appears from a number of the cases cited by the government, "control" is the "key".* Thus, these cases plainly could not apply to Mr. Friend who, by no stretch of the imagination, is a "control" person in AMREP. AMREP, of course, is a large public corporation, involved in disparate businesses (ranging from land sales to ownership of oil rights to publication of magazines), with thousands of employees and almost 10,000 shareholders. Mr. Friend never owned more than a relatively miniscule amount of AMREP stock and was never a member of its Executive Committee. The evidence shows that he did not become a Director of AMREP until 1971 (GX 1505) and was never a Director of Rio Rancho Estates, Inc.**

To the extent Mr. Friend had any duties at AMREP other than as General Counsel, those duties, the proof shows,

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* E.g., United States v. Bernstein, 533 F.2d 775, 781, 796-97 (2d Cir. 1976). (Defendants were "key officers". One defendant, the "principal corporate officer", was the sole owner of a corporation involved); United States v. Andreadis, 366 F.2d 423, 427 (2d Cir. 1966). (Corporation was "controlled by Andre who was also its President"); Nye & Nissen v. United States, 336 U.S. 613, 619 (1948). (Appellant was "manager" of the corporate defendant. "[H]is family was the chief owner of the business.")

** While Mr. Friend was a Vice President of Rio Rancho, one of nearly 70 subsidiaries of AMREP, the by-laws of that company (GX 948-A) show that his duties in that respect were limited nearly to reciting the minutes, if any, in the absence of the President.

related solely to construction, which, as will appear, is not a part of this case. The evidence plainly indicates that he never created, administered, or controlled land sales or marketing policy which apparently form the crux of this case.* In sum, Mr. Friend's corporate status can form no basis for an alleged "duty to investigate".

The government's reliance (Trial Memo., pp. 8-9) upon a supposed statutorily-imposed duty to investigate, in an attempt to buttress its otherwise bankrupt case against Mr. Friend, is plainly misplaced. No charge is made, nor have any facts been adduced which establish, that any federal government registrations or property reports were false or inaccurate. Indeed, Mr. Friend, having arrived on the scene in 1970 had every reason to assume, by reason of AMREP's stature as a publicly held corporation represented by reputable legal counsel, thatfederal filings were entirely proper.

Certainly, no statutory duty, even if it existed, would require a newly employed general counsel to re-investigate everything that had ever happened to the company, including

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* Compare, e.g., Andreadis, in which the court found that the individual defendant was in effect the alter ego of the corporate defendant, of which he was the president and owner. Further, the individual defendant had devised and executed the subject scheme and was solely responsible for reviewing and giving final approval to all advertising (366 F.2d at 427, n. 3, 430).

matters which had been reviewed by prior legal counsel. To hold otherwise would mean that any newly employed general counsel of any public corporation would automatically be criminally responsible for everything that had preceded him; and that unless he re-investigated and was prepared to repudiate everything which, in the government's view constitutes a "scheme to defraud", the newly employed counsel risks jail. We, of course, do not mean to suggest or imply that any activities of AMREP prior to 1970 were improper. The point is that no case in this or any other Circuit has gone as far as the prosecution seeks to go here in an attempt to impose criminal responsibility on Mr. Friend as an absolute guarantor not only of his own legal efforts but for the claimed acts of his predecessor counsel as well.

Further, whether or not any statutory "duty to investigate" existed with respect to Mr. Friend regarding matters arising after he became General Counsel to AMREP, the record, as will be discussed, shows that such inquiry did occur and that, with respect to the essential allegations of the government's case, Mr. Friend's actions negate any possible claim of criminality.

In sum, the government, in order to obtain a conviction of Mr. Friend, must prove, beyond a reasonable doubt, not only

the existence of a fraudulent scheme but also that Mr. Friend, with specific knowledge thereof and intent to defraud, joined that scheme. While we do not concede that the government has established any fraudulent scheme, it is unnecessary to argue that point here. For, as will appear, there is plainly insufficient evidence in the record to permit a reasonable person to conclude beyond a reasonable doubt that Mr. Friend joined any such scheme, and, accordingly, a judgment of acquittal is required. United States v. Taylor, supra.

I. The Evidence is Plainly Insufficient to Permit a Reasonable Man to Conclude Guilt of Mr. Friend Beyond a Reasonable Doubt

In analyzing the paucity of evidence in the record relating to Mr. Friend, we will treat with it by the subject matters which, from the prosecutor's opening statement, appear to constitute the thrust of this claimed case.

A. The "Scheme"

We have said from the outset that we are unable to discern precisely what it was that the government claimed was the "scheme" here. Frankly, after eight weeks of trial, we still find it difficult to define precisely what the government claims is the "scheme". We will not at this time, however, attempt any further analysis in this regard, because the government has failed to prove against Mr. Friend any participation in any "scheme". In fact, the evidence shows exactly the opposite.*

The great bulk of evidence predates Mr. Friend's employment by AMREP in February 1970. As the evidence shows

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* We, of course, do not concede that the government has proven the existence of any illegal "scheme". The point is that Mr. Friend had no participation in any illegal undertaking charged in the indictment, of whatever definition.

(e.g., GX 792, p. 2), Mr. Friend was a private attorney in the firm of Bass and Friend until he became general counsel for AMREP in 1970. At that point, of course, AMREP had been in the land business for nearly a decade. Its outside counsel had been Edward Winslow, who, until 1968, had been a member of Royall, Koegel & Rogers, one of the major corporate law firms in the country, and, thereafter, with Jacobs, Persinger & Parker, also a firm of substantial reputation. AMREP was a multi-million dollar corporation, listed on the American Stock Exchange. Included in its Board of Directors was a senior associate of Lehman Bros. and a Vice President of Chemical Bank. Its auditors were J. K. Lasser & Company. Its business was highly regulated, with substantial administrative scrutiny by New York and other states as well as by the federal government, through the office of Interstate Land Sales, a part of the Housing and Urban Development Agency. Thus, when Mr. Friend joined AMREP, he was, by all indications, joining a reputable and responsible, large corporation.

It was during this earlier period that all the elements which the government apparently now claims were part of a supposed scheme to defraud, were created and developed and all were in place by February 1970, when Mr. Friend became general counsel. Thus, the initial 54,000 acres of land at Rio Rancho had been acquired in July 1961. Rio Rancho Estates, Inc. had

been formed in August 1961 and had taken title to the land in the same year. The mail-order sales campaign had begun in 1961 and had been terminated in 1965. The dinner party concept had been developed in 1965, and whatever the sales techniques were used at the dinners were established then or shortly thereafter. All promotional and sales material such as "This Is My Land" (GX 388) and films such as "West Side Story" (GX 70) and "Your Golden Future" (GX 70) had been created, presumably passed through counsel, and submitted at least to the State of New York long before Friend's employment by AMREP. The contracts, including the six months visitation right and the exchange provision, had all been drafted. The negotiations to purchase an additional 31,000 acres of land were consummated in January 1969.

In short, the government has no basis for claiming that Mr. Friend was, in any fashion, involved in the formation or development of the Rio Rancho concept. There is absolutely no proof, nor could there be, that Mr. Friend believed anything except that he was leaving his private practice and joining a reputable, major company, which had been represented by respected counsel and, as a member of the closely regulated land industry, subjected to close governmental scrutiny.

Thus, the essential elements which comprise the crux

of whatever scheme the government claims occ ed had been developed long before Mr. Friend's appearance at AMREP. The sole question, then, is whether, after he began working for AMREP, Mr. Friend joined or aided and abetted a "scheme" with full knowledge of its supposed illegal purpose with intent to participate in the commission of a crime. The evidence affirmatively shows the contrary.

B. "Growth to the Northwest" and Comparable Land Prices

1. Growth to the Northwest

As this Court has already noted (Tr. p. 3383), the principal issue in this case concerns representations that Alburquerque, being surrounded on three sides, could only grow to the northwest, to and through Rio Rancho. The indictment charges that this misrepresentation was false, the prosecutor repeatedly referred to this during her opening statement (e.g., Tr. pp. 18, 40, 47-48), and countless witnesses were asked about it at the trial.

Despite the enormity of the record herein, there is not one shred of evidence which even begins to prove that Mr. Friend knew that such a representation was false. The government, during its case and in its Trial Brief dated December 6, 1976, made much of GX 66, the report prepared by Harmon, O'Donnell & Henninger, for Rio Rancho, in 1965-66, as proving

that the defendants knew of the supposed falsity of the statement. But, not one bit of evidence suggests that Mr. Friend ever heard of, let alone read, that document which was prepared some five years before he became General Counsel of AMREP.* Thus, what the government apparently regards as its major piece of proof of alleged wrongdoing has absolutely no probative value as to Mr. Friend.

Statements concerning the direction of Albuquerque's growth had been made for years in the Rio Rancho materials before Mr. Friend joined AMREP. Those statements presumably had been seen by outside counsel prior to that time, and they had been submitted to and cleared by the New York Department of State, which, as Mr. Perlmutter testified, from time to time sent inspectors to Rio Rancho (Tr. pp. 3405-07). Certainly if, as the prosecutor now claims, the statements as to the growth pattern of Albuquerque were patently incorrect, these inspectors would have so reported and prevented their publication. This fact, alone, must raise a reasonable doubt in any reasonable mind.

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* The Court will recall that Mr. Friend specifically testified before the Grand Jury that he had never heard of the Henninger study until October 1974, when he was given a copy of it in the midst of his duties as General Counsel of AMREP in gathering materials relating to one of the Grand Jury subpoenas herein (Tr. pp. 4748-49). Even then, there is no indication that he became aware of its contents.

Nor is there any evidence whatsoever that Mr. Friend knew of the study done by the Albuquerque Planning Commission in 1964, which the government also emphasized on its case. Again, the evidence leads to a contrary conclusion. Thus, in the film "West Side Story" (GX 70), presumably one of those which Mr. Friend asked to view in December 1971 (GX 629), contained a statement by Richard Vaughan, a City Planning Commissioner for Albuquerque (Tr. p. 4501). Vaughan stated in part:

> "As a City Planning Commissioner and a resident of the West Side, I'm optimistic about Albuquerque's growth and I feel very strongly that the key to Albuquerque's future lies in the development of the West Side."

This statement not only casts doubt on the government's whole contention about the 1964 study, but it confirms beyond question that Mr. Friend would have had no reason to reach a contrary conclusion when viewing the film.

Mr. Friend's own Grand Jury testimony (Tr. pp. 5817-19) that he had seen other developments, such as Paradise Hills and Volcano Cliffs in the northwest quadrant of Albuquerque, also confirms that he had no reason to disbelieve the statement. Far from proving any knowledge by Mr. Friend that Albuquerque would supposedly not develop toward the northwest, the testimony proves exactly the reverse. The fact that other development was occurring in the northwest quadrant could only confirm in his

mind the accuracy of representations as to Albuquerque's growth in that direction.

Any claim against Mr. Friend as to representations of growth direction is further negated by his review of the pamphlet, "This Is My Land". As Mr. Friend testified in the Grand Jury, he read pages 8 and 9 of that pamphlet for the first time in March 1972, when someone in the advertising department asked him for his legal opinion of changes therein which had been drafted by other members of the legal department (Tr. p. 5802). And, in fact, the record shows that a revised version of "This Is My Land" replaced its predecessor in May 1972 (Tr. p. 3332). Although the "new" version was admitted into evidence (GX 389), the government carefully omitted to show, much less read, it to the jury even though the "old" version (GX 388) was shown to the jury time and time again. The revision eliminated the language as to the "only" direction of growth, upon which the government now bases its case.*

The evidence thus shows that Mr. Friend first saw page 8 of "This Is My Land" in the context of his being asked

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* The "old" version had stated in part:

> "[T]he natural geography of the area makes it clear that this Sunshine City's population can continue to explode in only one direction * * *. It must take place toward the northwest." (Italics in original) (GX 388)

(footnote continued on next page)

to give legal approval to a change which eliminated the statement which the government claims was a lynchpin of the entire "scheme to defraud". There is simply no way, except through the sort of upside-down logic which has characterized the government's entire "case" against Mr. Friend, that his approving the elimination of that statement can be argued to prove that he participated in a "scheme" to use the statement that was eliminated.

In sum, there is no evidence whatsoever which establishes Mr. Friend knew the representation as to Albuquerque's direction of growth was, arguendo, false. What evidence there is confirms that he had no reason to disbelieve the statement and that, in any event, he gave legal approval to a change which eliminated any possible basis for criticism of it. Clearly, upon this record, there is no way a jury could conclude beyond a reasonable doubt that Mr. Friend was guilty of joining a supposed scheme to defraud on this charge. For this reason, alone, a judgment of acquittal should be granted.

(footnote continued from preceding page)

The "new" version of the pamphlet contained language which even the government's own witness, Mr. Pierce, essentially agreed was reasonable (Tr. pp. 4209, 4303). It stated in part:

> "[T]he natural geography of the area makes it clear that this Sunshine City's population is most likely to expand toward the west and northwest * * *. Expansion is destined to take place in the general direction of Rio Rancho Estates." (GX 389)

2. Comparable Land Values

Another matter which was charged in the indictment, emphasized in the prosecutor's opening statement, and the subject of extensive testimony throughout the trial concerned representations as to comparable land prices around Albuquerque. The prosecutor asked virtually every "victim" witness about what they were told about land prices in the Albuquerque area. Witness after witness was asked about page 9 of the brochure, "This Is My Land", which was used prior to May 1972 (GX 388). And, the jury was repeatedly shown that page. Page 9 contained numerous examples of land transactions in various sections of the Albuquerque area, and set forth the percent of profit obtained on each such transaction. The claimed "misleading"* nature of the examples is presumably that they were unfairly presented to potential purchasers as indicia of what should be expected at Rio Rancho.

At no point during the trial, however, did the government, even once, read or show to the jury page 9 of "This Is My Land" as it existed commencing in May 1972. As noted above, it was the "new" version of "This Is My Land" (GX 389) which

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* The Court will recall that, at one point, Mr. Devorkin stated in the presence of the jury that these examples were false, only to be forced to recant the statement the following day and to explain that the government claimed only that the statements were "misleading". (Tr. p. 750)

was brought to Mr. Friend in March 1972 for his legal opinion (Tr. p. 5802). Review of page 9 of the revised brochure makes clear why the government never read it to the jury. The revision eliminated numerous earlier examples of land transactions and omitted the references to percent of profit. Most significantly, however, the text of page 9 was changed to include the following very important disclaimer:

> "Obviously, no one can predict the future with any certainty. And no one can accurately forecast how population, inflation and other factors may affect the price of land. All we can do is look at what has happened in the past.
>
> "Accordingly, we are presenting here some selected examples of land price increases in different sections of the Albuquerque area. Each one shows transactions tracing the increases in price on various pieces of property over the years. These are strictly factual records and do not, in any way, represent or imply a promise or prediction of future land values or prices which, of course, depend on location, rate of development, marketability, population growth plus other factors."

Thus, upon any reasonable reading, this new language negates the government's claim that purchasers were misled into thinking that the examples were, in effect, "guarantees" of future land values at Rio Rancho. Furthermore, this revision completely negates any possible contention that Mr. Friend was a supposed participant in a scheme to mislead in this respect

or that he supposedly "closed his eyes" to alleged misconduct. Not only, we suggest, does this evidence show that Mr. Friend cannot be proven guilty beyond a reasonable doubt, but it establishes, beyond a reasonable doubt, that he is innocent of any such charges. This, too, confirms that a judgment of acquittal should be entered.

C. Sales Practices

Again, the record is devoid of any evidence that Mr. Friend was involved in any way in the creation, development or administration of sales practices for Rio Rancho. Obviously, Mr. Friend had no connection with mail order sales since that approach was terminated in 1965, five years before Mr. Friend became employed by AMREP. Thus, there could be no proof that he was in any way connected with the promotional materials used during the mail order phase, such as the booklets and map which the Government put into evidence through Mr. and Mrs. Clymer (Tr. pp. 5265-66).

Equally obvious is that Mr. Friend had nothing to do with development, in 1965, of the dinner party concept, nor is there any evidence that Mr. Friend had any knowledge of or participation in the sales techniques used at the dinners thereafter. There is no proof that Mr. Friend attended any dinner parties, nor, as this Court has already observed (10/21/76 Tr. 110-13), can a duty be inferred for Mr. Friend to attend them.*

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* In fact, as this Court is aware, Mr. Friend testified in the Grand Jury that he did not attend dinners. The Court will also recall that in arguing for the admissibility of that testimony, the government represented that the testimony supposedly constituted a "false exculpatory statement" and would be so proven (10/21/76, Tr. pp. 110-12). The government failed even to attempt to offer any evidence to support this palpably misleading representation. This, then, is but one example of the Government's overreaching in its effort to convict Mr. Friend.

Thus, there is no connection whatsoever of Mr. Friend with such alleged practices as "holds," allocations, "false deletions," etc. Indeed, Mr. Perlmutter, Vice President of Sales Administration for AMREP, testified (Tr. p. 3432) that he had not heard of the use of supposed "false deletions" and that such a practice would have been contrary to company policy. If Perlmutter, who is in charge of sales administration, did not know of this practice, there is certainly no reason to believe that Mr. Friend, who had no connection with sales, would have known of them.

The record is devoid of any indication that Mr. Friend was involved in making policy on sales or marketing matters, and, indeed, shows just the opposite. Thus, Perlmutter testified that policy decisions on marketing were made by other defendants (Tr. 3284). In fact, Mr. Friend was not present when Perlmutter spoke with other policy makers about development (Tr. 3544, 3546). Mr. Friend was not a participant in meetings of Area Sales Directors, except to appear briefly and speak concerning legal matters. (Potter, Tr. p. 2291; Perlmutter, Tr. p. 3502). Nor was Mr. Friend a participant in the "isolation meetings" at which matters of sales policy and administration were discussed (GX 539).

Mr. Friend did not participate in the evaluation of tours, tour results or sales (e.g., Mandel Tr. p. 863; Zaknich Tr. pp. 1036-40; Zaknich 1116-9), and there is no indication that he received the monthly sales report which Mandel sent to other officers (Tr. p. 745).

Again, there is no evidence that Mr. Friend knew of any practice of "hiding" the Property Reports or Offering Statements at dinner parties under the sugar bowls, etc. While Masone testified to such practices, he admitted that he had never been instructed to undertake them by either Mr. Lederman or Mr. Bondy, two ATC sales managers who were Masone's superiors (Tr. 2037-39). Both Lederman and Bondy testified that the Property Reports and Offering Statements were not hidden and were given to each customer (Lederman, Tr. p. 1885; Bondy, Tr. p. 1242).

Certainly, as Perlmutter testified, Mr. Friend was insistent that the government informational statements (Property Reports and Offering Statements) were to be given to the customers at the time of sale (Tr. p. 3502-03); indeed the legal requirements for distribution of the reports before a customer purchased were one of the legal subjects about which Mr. Friend

spoke on the few occasions when he briefly attended meetings of Area Sales Directors (Tr. p. 3502). Whatever aberrational practices, if any, may have been engaged in by any salesman, the practices were unauthorized by the company and clearly unknown by Mr. Friend. Even the government cannot claim purchasers were not given the reports after March 1972. For, at that point, AMREP, in addition to requiring that purchasers indicate their receipt of the reports by initialling their purchase contracts (Tr. pp. 3428-30), also required the purchasers to sign a receipt which was torn off the report itself (Masone, Tr. 2407).* There is simply no way it can be reasonably argued that Mr. Friend, after that date, could have known that customers supposedly were not given their Property Reports or that the Reports were "hidden". Indeed, it is a fair inference that the requirement for the receipts on the Reports was added precisely to ensure that there could be no question as to distribution thereof.

Finally, there is no evidence establishing that Mr. Friend knew of or participated in any way in whatever sales practices may have been utilized during the company-sponsored tours to Albuquerque or of any of the alleged tactics which the government apparently contends were part of the overall "scheme". There is simply no evidence that Mr. Friend had any contact with on-site sales personnel or any responsibility at all for the tours

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* In fact, this was a requirement at AMREP substantially before it was required by the law.

(Mandel, Tr. 863; Zaknich, Tr. 1110; Monaco, Tr. 2175-77).

In sum, all the evidence on this issue, too, confirms that the proof is plainly insufficient to permit the jury to conclude beyond a reasonable doubt that Mr. Friend is guilty of any crime.

D. Liquidity and Resale

Another of the charges against the defendants, including Mr. Friend, relates to alleged misrepresentations that Rio Rancho property represented an opportunity for quick profit and could be resold easily. The record, however, does not support this charge. Thus, a number of present and former personnel of the corporate defendants testified that such statements were not made and, indeed, were against company policy (Mandel, Tr. pp. 793, 885, 932; Lederman, Tr. p. 1832; Monaco, Tr. pp. 2251, 2270; Potter, Tr. p. 2306).* And, a number of the "victim" witnesses confirmed that no such statements were made to them (e.g., Finnen, Tr. p. 1494; Davis, Tr. p. 2407; Mohammed, Tr. p. 2457; Switt, Tr. p. 2675).

But, regardless of whether or not such statements were made, the record is clear that Mr. Friend did not know of, or participate in, any "scheme to defraud" customers thereby. Mr. Friend, of course, testified before the Grand Jury in 1975 that he did not believe that there was then a resale market for Rio

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* It was company policy to terminate salesmen who were caught making misrepresentations. Both Mandel and Bondy so testified (Tr. pp. 944, 1346). AMREP's training manual specified that salesmen would have to learn the terms of property reports (Tr. pp. 3422-24; DX CY; DX CX), and the salesmen's contracts provided that they were to use only authorized, approved literature, and that they could not make misrepresentations or embarrass the Company (Tr. pp. 925, 3420).

Rancho property or that there would be one in the immediate foreseeable future, until the property was sold out (Tr. p. 5804). He also testified that he knew a purchaser could not resell his land readily because he would be in competition with the company who sold it to him (id.). But none of this proves anything as to Mr. Friend's supposed participation in a "scheme" to defraud customers into believing their property could easily be resold for a profit.

To the contrary, Mr. Friend's testimony as to resale was exactly consistent with what he believed customers were being told. Thus, as already noted, Mr. Friend was adamant that customers were to be given Offering Statements, which, throughout Mr. Friend's tenure at AMREP, specifically stated:

> "Lots may also be purchased for speculative purposes but such purchasers are advised that resale for a profit may be difficult for a number of years in view of the fact that water and utilities may not be available to certain lots for an indefinite number of years; that a percentage of the purchase price paid is included therein for use in advertising and development; and that in trying to make a resale the purchasers may be competing with the Company, which has thousands of lots to sell." (GX 792, p. 3)

Nor does Mr. Friend's testimony prove in any way he knew that customers, arguendo, were being told that they could resell their land readily or that there was a resale market. The record proves the contrary. The evidence is that Mr. Friend

was insistent that no misrepresentations were to be made by salesmen (Perlmutter, Tr. p. 3504), and he was repeatedly assured that no representations as to resale were being made. As early as January 1971, Mr. Perlmutter advised him by memorandum that:

> "A memo was sent out several weeks ago to all offices restating that we do not have a resale policy and instructing all salesmen that this should not be in their sales pitch." (DX CY)

Perlmutter also told Mr. Friend in the same memorandum that experienced personnel were confirming every new sale by telephone one week after the contract was mailed to the customer and that records were being kept of anything that did not conform to corporate policy (id.). Far from proving that Mr. Friend was participating in or "closing his eyes" to such matters, it is a fair inference that Mr. Friend must have inquired about resale representations, since Perlmutter, who was not in the legal department, would otherwise have had no other reason to write to Mr. Friend.

Again, in February 1972, Perlmutter was instructed during a meeting with Mr. Friend and Daniel Friedman to send a memorandum to all Area Sales Directors reiterating forbidden sales practices (Tr. p. 3310). This resulted from a similar competitor's brochure which Mr. Friend had obtained and distributed within the company (id.), again negating any contention

that Mr. Friend was "closing his eyes". Perlmutter's memorandum (GX 1405) reaffirmed that certain statements were "forbidden" and that any salesman caught making such a statement was to be "terminated immediately". The forbidden statements included: "You don't need a federal property report"; "this is a quick return on investments"; and "we will resell your property at any time." (GX 1405).

Mr. Friend's advice in this regard is also reflected by his recommended revisions for the film script of "Your Golden Future", which, as Mr. Friend testified, he reviewed on March 7, 1972 (Tr. p. 5801). Indeed, GX 629 shows that Mr. Friend specifically called for review of the Rio Rancho films in late 1971.

GX 341 is a copy of the Golden Future script with the revisions which Mr. Friend recommended in March 1972. As appears therefrom he, inter alia, recommended deleting paragraphs 65 and 66 of the script which, among other things, had stated that land prices in Albuquerque had "doubled, and doubled again and again" in the last 20 years and had contained references as to the appreciation of property near Rio Rancho. In several places, he struck references to the purchase of Rio Rancho land as an investment (e.g., ¶¶ 69, 70). He recommended deletion of the references to the "land boom" in Albuquerque (¶ 75) and to the

leverage concept (¶¶ 77, 80-82). He recommended changing paragraph 83 of the script which had stated that land "can only increase in value". He struck paragraph 86 of the script which had referred to the leverage theme of controlling land and increases in land prices of 20-300%. And, he recommended eliminating the entire conclusion of the script or rewriting it to eliminate references to investment for profit and to emphasize, instead, "a better way of life".

The recommended changes in the script were thus clearly of a substantive nature. And, they go right to the heart of the government's charges against him in this case. GX 341 provides clear, contemporaneous evidence of Mr. Friend, as a careful lawyer, advising his client to eliminate the very sort of statements which apparently now constitute a principal basis for the charges in this case. Mr. Friend's action, like that reviewed above, can only prove his good faith and, once again, disprove any allegation that he was supposedly "closing his eyes" to alleged misconduct, let alone participating in a purported scheme to defraud.

Mr. Friend's Grand Jury testimony as to his directions in November 1972 concerning the permissible content of sales presentations also confirms his good faith and lack of alleged

criminal intent. Thus on a plane trip in November 1972 he discussed with Peter Miller (General Manager of ATC) what he thought Miller's oral presentation could and could not contain (Tr. p. 5803). Mr. Friend made it "absolutely clear" that the oral presentation could not contain "any reference directly or indirectly to any monetary rewards from the purchase of the land . . . that is, a person could get rich quick, that they could resell [his] land, that it was a liquid investment" (id.). This, again, is clear and specific evidence of Mr. Friend's good faith efforts to avoid any possibility of "misleading" prospective buyers.

In sum, the record shows a consistent pattern over a two-year period of Mr. Friend's counselling his client against making precisely the sort of statements which now purportedly form the basis of the changes herein. Significantly, it should be noted, this advice was given before any Grand Jury investigation or FTC proceeding against AMREP.

The record also confirms that Mr. Friend's advice to Miller in November 1972 was apparently followed. Thus, Daniel Monaco, a government-immunized witness who had been Tour Director and, beginning in March 1973, General Manager of ATC (Tr. p. 2245), testified that the emphasis upon investment in

the sales presentations at ATC was changed in late 1972 or early 1973. Thereafter, the presentations instead emphasized living at Rio Rancho as a better way of life (Tr. pp. 2251, 2270). The same change in emphasis is also apparent in the film, "A New World of Living" (DX BR, the so-called Vaughn film) which came into use in late 1973 or early 1974 (Tr. p. 2252), supplanting "Your Golden Future". The Vaughn film, as the government obviously realizes*, also stresses life at Rio Rancho, not investment for profit. And, ultimately, in late 1973 or early 1974, all salesmen were instructed that there could be no reference, in any context at all, to "investment"; rather, the sales approach was to focus solely upon relocation to Rio Rancho (e.g., Miller, Tr. p. 2867).

In sum, the evidence, far from showing that Mr. Friend participated in any "scheme" to sell land at Rio Rancho for quick profit and easy resale, proves exactly the opposite. To the extent there is any proof at all on the subject, it shows that Mr. Friend was told that no such representations were made and, in any event, that he repeatedly counselled against them. Indeed, it is a fair inference that the entire sales approach as to investment at Rio Rancho was changed because of his repeated advice. Thus, Mr. Friend should be commended for his

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* The government did not offer this film in evidence.

efforts, not prosecuted. Based upon this record, there is simply no way a reasonable person could conclude that Mr. Friend is guilty at all, let alone beyond a reasonable doubt. The evidence, we suggest, confirms, beyond any reasonable doubt, his innocence and plainly indicates that a judgment of acquittal should be entered.

E. Friend's Activities Generally

What evidence there is in the record concerning Mr. Friend confirms that, like any general counsel, he was involved in various legal matters, as were other members of his legal staff to whom various duties, such as the review of advertising and handling of manuals, were delegated (Tr. pp. 3499, 5800).

For instance, once a decision had been made to raise prices at Rio Rancho, Perlmutter notified the legal department so that the necessary state approvals could be obtained and any necessary amendments to Property Reports could be made (Tr. pp. 3279-80, 3504-05). While Perlmutter once notified Mr. Friend in this regard (GX 527), this legal function was assumed by Mr. Mantel, one of the attorneys in the legal department (Tr. p. 3505).

The legal department also had some responsibility for review of advertising materials for Rio Rancho. This responsibility, as Mr. Friend testified, was carried out by the six lawyers in the legal department who worked under him (Tr. p. 5800). To the extent the record indicates any particular review by Mr. Friend of any advertising, we have discussed it above, and, as noted there, this evidence clearly disproves the government's charges against him.

We also note in this regard that the government, in its Trial Brief dated December 6, 1976 cites (p. 29) a page of AMREP administrative manual supposedly as some evidence against Mr. Friend. In fact, Perlmutter could not be certain which manual he had sent to Mr. Friend (Tr. pp. 3494, 3500). Moreover, Perlmutter testified that Mr. Parkoff, not Mr. Friend, was the person in the legal department who handled such matters as revision of the manual (Tr. p. 3499). Thus, the evidence shows that if anyone in the legal department was aware of the subject page, which was added to the manual after its initial distribution (see Tr. pp. 3161-65), it would have been Mantel or Parkoff, not Friend. Furthermore, even if Mr. Friend had seen the page, it would hardly prove any participation in a "scheme".

Mr. Friend, as part of his legal duties, also closed the acquisition of the fourth parcel of property from Governor King on January 25, 1971. Mr. Friend's activity in this regard, however, is immaterial to the instant case. The closing statement for the transaction shows that he was present as the attorney for Rio Rancho, which was represented by corporate officers (GX 732). The record is devoid of any evidence that Mr. Friend participated in the decision to make this additional acquisition. To the contrary, the closing statement (GX 732) shows that the acquisition was pursuant to an agreement dated June 30, 1970, which was before Mr. Friend had even become a director of AMREP (see GX 1505). (Mr. Friend was never a

director of Rio Rancho (see GX 1506)). As part of the closing, Mr. Friend negotiated with Governor King concerning payment for grazing rights on certain land which had been acquired in December 1970. This, again, shows no more than Mr. Friend was acting as an attorney at the closing. If this proves anything, it proves Mr. Friend's good faith aim to be able to give purchasers clear title to the property -- hardly a badge of fraud.

The only possible relevance of this transaction in this case would be supposedly to show that Mr. Friend knew that additional land was being acquired at the same time purchasers, arguendo, were being told that property was almost sold out. The fact is that there is no evidence that Mr. Friend had any knowledge whatsoever of such representations, if any, to customers. Indeed, the proof tends to establish that, if such representations were made, they had been terminated in 1969, when Rio Rancho initially commenced purchasing the property. Thus, Mr. Lederman, a Sales Director for ATC, specifically stated that such representation had ceased when AMREP commenced purchasing additional property in 1969, before Mr. Friend became employed by AMREP. "Victim" testimony also confirms Lederman's statement. For example, Mrs. Greenberg testified that while she was told at dinner parties in 1966 and

1968 that the land was almost all gone, no such statement was made at the dinner which she attended in 1971 (Tr. pp. 1829-32).

In short, the government's evidence as to Mr. Friend's legal activities does not establish in any way Mr. Friend's supposed participation in an improper scheme.

The record, of course, also confirms that Mr. Friend eventually became involved in construction matters for AMREP. But this proof is of no greater probative force on the government's case than that discussed above. Mr. Friend's involvement in construction activities simply proves that he was involved in accomplishing what the company said would be done, development of the property. It certainly does not establish his participation in the government's claimed scheme not to develop Rio Rancho.

Indeed, the government would prefer to avoid any mention of the community which has been developed at Rio Rancho. As the prosecutor put it in her opening statement: "[T]here is a community at Rio Rancho. That is not what this case is about" (Tr. p. 49). The fact is that millions of dollars have been spent on developing the community, including the shopping center, one of the best sewerage treatment facilities in the Southwest (Pierce, Tr. p. 4145; Carruthers, Tr. pp. 4572-75),

and construction of a golf course and country club (Monaco, 2198, 2246). In an attempt to avoid the obvious impact of this extensive development on its case, the government is forced either to resort to upside-down reasoning or to offer immaterial evidence concerning the ultimate, complete development of all of Rio Rancho.

For example, the government read into the record Mr. Friend's Grand Jury testimony when he was questioned about the number of houses which had been built at Rio Rancho. As the record shows, however, this testimony was simply based upon a computer print-out which Mr. Friend had brought to the Grand Jury at the request of the prosecutor during a prior session (Tr. pp. 5806-07). More importantly, Mr. Friend's testimony as to annual construction rates at Rio Rancho has nothing whatsoever to do with proving his participation in the alleged scheme not to develop the property. To the contrary, the construction figures recited by Mr. Friend (Tr. pp. 5807-08) confirm that over half of the houses constructed at Rio Rancho were built during his tenure. This then is another example of the prosecution's Kafkaesque approach; intensive development statistics at Rio Rancho are cited apparently to prove the government's claim that the defendants supposedly did not intend to develop Rio Rancho.

Again, the government read into the record Mr. Friend's Grand Jury testimony in which he was asked his opinion as to when all lots in the entire Rio Rancho subdivision would be developed with houses and as to the number of people he anticipated would ultimately reside there (Tr. pp. 5809-13). His testimony shows on its face that he was simply speculating in this regard or that he was testifying from data contained in a statement that he was shown during the Grand Jury proceedings. His agreement (Tr. p. 5183) with the prosecutor's question, based upon an assumed construction rate of 350 houses per year, that it would take 200 years to fill 70,000 lots is simply agreement with her arithmetic and no more.

But, whether or not Mr. Friend's testimony was based on personal knowledge, it is of little or no probative value in this case. Certainly, it is no evidence of his participation in any "scheme". There is no evidence in the record showing a pattern of representations that the entire subdivision would be developed within a short period of time or by any given date or that Mr. Friend knew of such representations, even if made. Almost every "victim" witness understood that he or she was purchasing raw land, without utilities, and that it could well be years before utilities would reach their actual piece of property (e.g., Henry, Tr. p. 332). The Offering

Statements and Property Reports given to the purchasers also made this clear (e.g., GX 789, p. 8). Further, these same witnesses understood that, if they wished to build before utilities reached their lot, they could exchange their developed lot for a lot with utilities in the building area (e.g., DeWitt Tr., p. 2123; Davis, Tr. p. 2422). The record therefore disproves any claim that purchasers were misled into believing in effect that they were purchasing land that was, or would shortly be, improved with utilities. And, certainly, it does not establish Mr. Friend's participation in any such scheme whether or not it existed.

Furthermore, arguments concerning full development of all lots at Rio Rancho are simply immaterial in terms of increases in land values there. Obviously, full development of all lots is not required before land values could increase. Any development of any of the property would increase the value of all of it, and, the greater the development, the greater the increase. And, obviously, the closer a purchaser's property was to the development, the more its value would increase. This is true of the development which has already occurred and will continue to be so in future development. It should be noted in this regard that the prosecutor's questions to Mr. Friend, based upon an assumed construction rate of 350 houses per year,

ignored the likelihood that outside contractors would build at Rio Rancho, as has already occurred (Perlmutter, Tr. pp. 3478, 3530-32), and that as development continues, it, like any development, will expand geometrically, not simply arithmetically. In short, Mr. Friend's participation in construction at Rio Rancho and his Grand Jury testimony concerning development does little except disprove the government's purported case against him.

Similarly immaterial and lacking in probative value is the prosecutor's questioning of Mr. Friend concerning the number of lots available for exchange (Tr. pp. 5813-14). As this Court has observed (Tr. pp. 5472-73), the government simply has not proved any scheme in this regard. Thus, there is no evidence that, in 14 years, a single customer has been unable to exercise the privilege to exchange into a building area, and consequently, the evidence provided no basis for proof of any "scheme" on this allegation (id.).*

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* When asked whether, with 24,000 lots available for exchange in the building areas and an assumed building rate of 300 homes per year, it would be roughly 80 years before the building area would be filled, Mr. Friend answered, simply, "I guess that's right." Assuming the accuracy of the data in the prosecutor's question, this testimony shows that it will be at least 80 years before even, arguendo, there would be insufficient land for customers to exchange into building areas, again confirming the absence of any "scheme" in this regard.

Also immaterial is the questioning of Mr. Friend concerning his knowledge of the absence of an exchange privilege in commercial and multi-dwelling contracts (Tr. pp. 5814-16). He testified that he had looked at such contracts only once, in the context of a truth-in-lending question concerning a provision on the face of the contract which he reviewed with Edward Winslow, outside counsel for AMREP. Mr. Friend did not learn of the absence of the exchange privilege on the reverse side of the contract until shortly before his Grand Jury appearance in 1975. Not only is this testimony immaterial to the charges made here, but, whether or not Mr. Friend was aware of the absence of an exchange privilege, there is no evidence which even begins to prove that he was aware that, arguendo, customers had been misled into believing that there was an exchange privilege in such contracts. In fact, the record contains virtually no evidence of any such misrepresentation. Indeed, the absence of an exchange privilege in commercial and multi-family contracts, going back many years before Mr. Friend had even joined AMREP, appears from the reverse side of the contracts which are in evidence. Again, this testimony amounts to no proof of any participation by Mr. Friend in a "scheme" to defraud.

In summary, a review of the evidence shows, beyond question, that the proof admitted on the government's case is

plainly insufficient to permit a reasonable person to conclude Mr. Friend's guilt beyond a reasonable doubt. United Sta s v. Taylor, supra. To the contrary, to the extent the record contains any evidence at all as to Mr. Friend, it confirms his innocence, not his supposed guilt. Accordingly, a judgment of acquittal should be entered.

II. Absent a Judgment of Acquittal, Severance of Friend is Required

As noted at the outset, 95 percent of the evidence in this massive record has nothing to do with Mr. Friend. If Mr. Friend is permitted to remain in this case, when it goes to the jury, there can be no question that he will suffer from a prejudicial and improper "rub-off" or "transference of guilt" from evidence relating not to him but to others. United States v. Kelly, supra; United States v. Geaney, supra; and United States v. Mardian, F.2d , Docket No. 75-1383 (D. C. Cir. Oct. 12, 1976).

The danger of a "rub-off" is particularly egregious in this case, which, as already discussed, requires proof of Mr. Friend's specific, personal knowledge and intent. Much of what the government apparently regards as its crucial evidence, such as the Henninger study (GX 66) and the Hollander

training tape (GX 669) predates, by years, Mr. Friend's employment by AMREP in 1970. While cases hold that the acts and declarations of one co-conspirator in furtherance of the conspiracy may be admitted as to other co-conspirators once a connection is established, this is not the case as to the knowledge, apart from acts and declarations, of a co-conspirator. Knowledge and intent must be determined separately for each defendant, and here, this determination could mean the difference between conviction and acquittal.

To take but one example, a jury, arguendo, could base a finding of guilt upon a defendant's knowledge of the Henninger study, whereas it might well vote to acquit a defendant who had no such knowledge. Thus, it becomes imperative that the jury be able to differentiate the proof relating to the knowledge of each defendant. In the circumstances of this case, however, it is simply inconceivable that the jury will be able to separate out from the huge welter of evidence only that which concerns the knowledge of Mr Friend, for example, as opposed to that of others. Consequently, important evidence as to matters of which Mr. Friend clearly did not have any knowledge or participation, such as the Henninger study, may improperly be used to convict him. This, alone, is sufficient to require severance as to him.

In summary, clearly "the moment" has come when there can be no question that Mr. Friend will be "prejudiced by the

accumulation of evidence" against his co-defendants. United States v. Kelly, 349 F.2d at 756. Accordingly, in light of the extraordinary circumstances of this case, a severance of Mr. Friend must be granted if a judgment of acquittal is not entered.

Conclusion

For all the reasons discussed above, a judgment of acquittal should be entered as to Mr. Friend and, in the absence of such a judgment, an order should be entered severing the trial of Mr. Friend from the instant proceedings.

Dated: December 28, 1976

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA, :

-against- :

AMREP CORPORATION, et al., : S 76 CR. 644 (CMM)

Defendants. :

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MEMORANDUM OF DEFENDANT FRIEND IN SUPPORT OF HIS OBJECTION TO ADMISSION OF EVIDENCE CONCERNING GRAND JURY PRODUCTION OF GX 66

On December 10, 1976, the Government provided the Grand Jury testimony of Joan Dacey to defense counsel as part of its §3500 production. That testimony relate solely to the production for the Grand Jury in January 1975 of what has now been received in evidence as GX 66, the so-called Henniger study. The Government apparently wants to use this evidence in an effort to "connect" Mr. Friend with the Henniger study, and thereby with the alleged scheme. Miss Dacey testified that, when the prosecution requested her, as an attorney for the Company, to produce the Henniger study, she called Mr. Friend, who said that he thought that such a document was located on his window sill.

The court will recall that this incident was also the principal subject of Mr. Friend's Grand Jury testimony on

January 28, 1975.* As a review of Mr. Friend's testimony on January 28 shows, he had never heard of the Henniger study prior to October, 1974, at which time it was given to him by Mr. Carity.** Mr. Carity said that the study was not the "Master Plan" and that the study had never been implemented. Mr. Friend, as General Counsel for AMREP, was then coordinating in-house activities concerning the Government subpoenas. (He had not then been told he was a target of the Grand Jury investigation.) Based on the information given him by Mr. Carity, Mr. Friend determined that the report was not required to be produced under the paragraph of the subpoena calling for the production of documents concerning the Master Plan. He did not read the study that time, but merely put it on the window sill in his office. Mr. Friend's office was then used in part as a collection point for thousands of pages of documents which were being gathered by the Company.

The record thus shows that Mr. Friend had absolutely no knowledge of the Henniger study before October 1974, and that his only connection with it was in the course of gathering materials as an attorney for the Company, in connection with the

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* This testimony was previously the subject of our motion to dismiss the indictment as to Mr. Friend for failure to give him the required target warnings.

** Mr. Carity had been assigned to gather materials from throughout the Company relating to the paragraphs of the subpoena which called for "all documents reflecting the 'Master Plan' for Rio Rancho Estates . . ."

Grand Jury proceedings. That fact simply has no probative value in proving his supposed participation in the alleged scheme, and, accordingly, should not be admissible.

Nor should evidence as to this incident be admissible as to Mr. Friend under any theory of alleged "consciousness of guilt" based on the nondelivery of the Henniger study to the Grand Jury until January 1975. As noted, Mr. Friend was told that the Henniger study was neither the Master Plan nor implemented, and, therefore, he determined it was not called for under the "Master Plan" part of the subpoena. Another paragraph of the subpoena called for documents relating to the "usability" of the land at Rio Rancho, which arguably did include the Henniger study. However, as Mr. Friend testified, he simply did not focus on that paragraph when the study was given him by Mr. Clarity, who had been assigned to gather materials relating to the "Master Plan" requests. The document was not hidden, let alone destroyed. It was left in the open, in Mr. Friend's office, and, at his direction, it was produced immediately when called for by the Government in January 1975. At very most, the incident may reflect an oversight, or even a mistake in judgment, made in the course of producing thousands of documents, but such matters cannot properly be used to show "consciousness of guilt". Berthold-Jennings Lumber Co. v. St. Louis, I.M. & S. Ry. Co., 80 F.2d 32, 42 (8th Cir. 1935), cert. denied, 297 U.S. 715 (1935);

Sellmayer Packing Co. v. Commr. of Internal Revenue, 146 F.2d 707, 709-10 (4th Cir. 1944).

Even if, arguendo, evidence as to the incident were properly admissible under a theory of consciousness of guilt, the proof would, at most, be of limited probative value. The evidence, however, would be inflammatory and highly prejudicial, particularly if it is to come from the testimony of Miss Dacey, who has been assisting defense counsel in the courtroom throughout the trial. Balancing the potential for prejudice against the probative value, if any, of the evidence thus shows that exclusion of the evidence is plainly indicated. F.R. Evid. 403.

Finally, in order to admit proof as to Mr. Friend's supposed "consciousness of guilt", the "guilt" (here, knowing participation in the "scheme") must, we submit, first be evidenced by proof other than that supposedly establishing "consciousness". This has not been done.* Furthermore, the Government's Trial Brief, dated December 6, 1976, makes no mention whatsoever of this incident as proof against Mr. Friend (see pp. 27-30), even though the Brief specifically does mention the Henniger study in respect to other defendants (e.g., pp. 36, 41). The Government

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* Evidence of the subject incident, of course, could not be admitted in this case under some theory of an alleged scheme to conceal, since none is alleged in the indictment. Grunewald v. United States, 353 U.S. 391 (1957).

represented in its Brief that it was setting forth "the proof against the individual defendants which has already been received in evidence during this trial and . . . what the Government expects the evidence to show with respect to the individual defendants during the remaining weeks of the Government's case in chief" (p. 1). While the government also stated (id.) that their Brief was not an "exhaustive itemization" of all the evidence, certainly the government must have known of the instant proof which it seeks to offer a week later on what the government obviously considers to be an important point in the case. For this reason, too, the evidence should be excluded.

Dated: December 13, 1976

Respectfully submitted,

ROGERS & WELLS
Counsel for Solomon H. Friend
200 Park Avenue
New York, New York 10017
(212) 972-7000

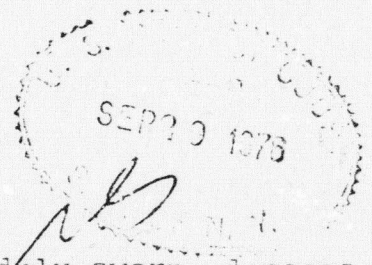
A 9366

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Metzner, J

UNITED STATES OF AMERICA,	:	75 Cr. 1023 (CMM)
v.	:	AFFIDAVIT IN OPPOSITION TO OFFER OF GRAND JURY TESTIMONY OF SOLOMON H. FRIEND
AMREP CORPORATION, et al.,	:	
Defendants.	:	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)



LARRY M. LAVINSKY, being duly sworn, deposes and says:

1. I am a member of the firm of Proskauer Rose Goetz & Mendelsohn, counsel to the corporate defendants. This affidavit is submitted in accordance with the Court's request that defense counsel submit by noon on Wednesday, September 29, 1976, any objections they may have to the admissibility of those portions of the defendant Solomon H. Friend's grand jury testimony the government plans to offer against him at trial.

2. While the corporate defendants have particular objections to the admissibility of certain excerpts of Mr. Friend's grand jury testimony, as more particularly set forth below and in the annexed exhibit, the overriding objection to all the testimony the government plans to offer derives from the corporate defendants' Sixth Amendment rights as enunciated in Bruton v. United States, 391 U.S. 123 (1968). The testimony at issue, while nominally offered

only against defendant Friend, deals extensively with and contains pejorative characterizations concerning the activities, assumptions and beliefs of the corporate defendants. These characterizations were made as Mr. Friend sought to exculpate himself at the expense of others. The admission of this testimony would be highly prejudicial to the corporate defendants absent an opportunity to cross-examine Mr. Friend.

3. Much of the testimony the government seeks to offer deals with changes Mr. Friend claims to have made in Rio Rancho's advertising and promotional material. In attempting to demonstrate his own lack of culpability, Mr. Friend time and again was driven to make disparaging assertions concerning the material in its original form. For example, in discussing certain changes he made in the pamphlet called "This is My Land", Mr. Friend stated:

> "Without my language I would say the statements are misleading." (Testimony 9/11/75, Afternoon Session, p. 94, l. 14)

Similarly, in discussing changes he suggested for the script of a film used to promote Rio Rancho, he first asserted that, as originally written, a statement concerning ground water was "technically incorrect" and then went on to state:

> "I don't think it was a correct statement. I think it was a troublesome statement." (Testimony 9/4/75, Morning Session, p. 61, ll. 10-24)

Further, referring to a change that he made in the script of the promotional film "Your Golden Future", Mr. Friend asserted:

Exhibit A

> "I say even though the statement [as originally written] is literally true, sometimes a literally true statement has implications which come through. Something could be misleading even though word for word it is literally true."
> (Testimony 9/11/75, Morning Session, p. 21, ll. 4-7)

In line with this theme, Mr. Friend's testimony is studded with instances in which he sought to emphasize his role in making salutory changes by eliminating statements that in his view created misleading "impressions". See e.g., 9/11/75, Morning Session, p. 28, ll. 14-17; 9/11/75, Morning Session, p. 33, ll. 12-23; 9/11/75, Morning Session, p. 40, ll. 17-20; 9/11/75, Morning Session, p. 44, ll. 13-21; 9/11/75, Morning Session, p. 46, ll. 12-13. This type of testimony by a defendant would, under normal circumstances, adversely impact upon co-defendants at a joint trial. Here, the problem is compounded by the fact that the testimony offered by the government is that of Amrep's former general counsel, whose opinion will no doubt influence a jury.

4. However, Mr. Friend did not confine himself to opining on matters arguably within the "expertise" of an attorney. Guided by his desire to please the prosecutor and avoid indictment, Mr. Friend expressed himself on such diverse matters as when, in his opinion, Rio Rancho would be fully developed and the alleged lack of a resale market. As to the former, Mr. Friend declared:

> "I think it would be folly to suggest that the entire subdivision will be developed in my lifetime."
> (Testimony 9/4/75, Morning Session, p. 64, ll. 21-22)

As to the latter, Mr. Friend stated:

> "There is no resale market now. There will not be in the immediate foreseeable future until the property is all sold out. I believe that to be true." (Testimony 7/24/75, p. 52, ll. 16-19)

5. Manifestly, the introduction of evidence of this kind under circumstances where the corporate defendants do not have an opportunity to cross-examine would do violence to their constitutional right to confront their accusers. The government's statement in its letter of September 27, 1976 to the Court that "any reference to a co-defendant will be deleted" does not avoid this problem. It is impossible to delete all reference to the corporate defendants or "the company" or "they" or "you", meaning the corporate defendants, without making the testimony unintelligible. Even if it were possible to "redact" the testimony and be left with an intelligible text, the prejudicial impact upon the corporate defendants, and their need to cross-examine would remain.

6. The Bruton dilemma is exacerbated by the fact that Mr. Friend, as part of his defense, will undoubtedly want to read other portions of his grand jury testimony at trial. Thus, defendants, without the benefit of cross-examination, may be confronted by such testimony as the following:

> "Complaints were, so to speak, coming out of the woodwork. But, they were complaints that had been -- that were arising from sales that were mad prior to the time that I joined the company."
> (Tr. 7/29/75, Afternoon Sessio p. 10, l. 5)

"If anything got cleaned up, I did it."
(Tr. 7/29/75, Afternoon Session, p. 34, l. 11)

and

"I worked my rear end off trying to get this company to do something right."
(Tr. 7/31/75, Morning Session, p. 97, l. 14)

As the Supreme Court recognized in Bruton, when explaining his actions, one defendant is motivated "to shift blame onto others". The Court therefore held that the prejudicial effect of such testimony is "intolerably compounded when the alleged accomplice . . . does not testify and cannot be tested by cross-examination." 391 U.S. at 136

7. It should be apparent from the foregoing that the Bruton problem presented by the grand jury testimony the government seeks to introduce is so pervasive as to require that the testimony be excluded in its entirety. In addition, as appears from the annexed exhibit, there are a variety of objections to specific portions of the testimony which would, in any event, require exclusion of substantial portions of it. These include objections based upon the attorney-client and work product privileges, hearsay, and prejudicial or argumentative statements by the prosecutor.

For all of the reasons stated above, we urge that the proffered grand jury testimony of Solomon H. Friend be rejected in its entirety.

Larry M. Lavinsky
LARRY M. LAVINSKY

Sworn to before me this
29th day of September, 1976.

Lois D. Thompson
Notary Public

LOIS D. THOMPSON
NOTARY PUBLIC, State of New York
No. 4702253
Qualified in New York County
Commission Expires March 30, 1977

Exhibit A

Prejudicial, Inflammatory Statements

7/24/75	p. 10 (2472) lines 18-20
	p. 11 (2473) lines 11-25
	p. 13 (2475) lines 2-11
9/11/75 - A.M.	p. 23 (3227) line 22
	p. 58 (3262) lines 6-7
	p. 59 (3263) line 6
9/11/75 - P.M.	p. 60 (3264) line 22
	p. 61 (3265) lines 4-10

Lack of Adequate Foundation

7/31/75 - A.M.	pp. 10-12 (2740-2742) lines 17 et seq.
7/31/75 - P.M.	p. 22 (2752) lines 5-14
9/4/75 - A.M.	p. 59 (2981) lines 13-18
	pp. 63-65 (2985-2987) lines 23 et seq.
	p. 70 (2992) line 21 - 74 (2996) line 14
9/9/75 - A.M.	pp. 2-7 (3084-3089) lines 15 et seq.
	p. 43 (3125) lines 16-22
9/9/75 - P.M.	pp. 100-101 (3182-3183) lines 10 et seq.
	pp. 108-110 (3190-3192) lines 23 et seq.
	p. 118 (3200) lines 10-23
9/11/75 - A.M.	p. 18 (3222) lines 4-25
	p. 19 (3223) lines 2-14
	pp. 23-25 (3227-3229) lines 3 et seq.
	pp. 58-61 (3262-3265) lines 8 et seq.
	p. 72 (3276) lines 6-9
	p. 75 (3279) lines 12-15
	p. 77 (3281) lines 10-17

Hearsay Within Hearsay

9/9/75 - A.M.	pp. 2-7 (3084-3089) lines 15 et seq.
9/11/75 - A.M.	pp. 2-4 (3206-3208) lines 11 et seq.
9/4/75 - A.M.	p. 74 (2996) lines 4-8
10/16/75 - P.M.	p. 4 (3426) lines 6-24

Testimony, Characterizations, Improper Comments by Prosecutor

7/24/75	p. 51 (2516) lines 11-15
9/4/75 - A.M.	p. 76 (2998) lines 10-13
	p. 78 (3000) lines 23-25
9/4/75 - P.M.	p. 38 (3046) lines 17-21
9/9/75 - A.M.	pp. 44-46 (3126-3128) lines 4 et seq.
9/11/75 - A.M.	p. 46 (3250) lines 6-8
9/11/75 - P.M.	pp. 70-71 (3274-3275) lines 5 et seq.
	p. 72 (3276) lines 6-16
	p. 85 (3289) lines 10-21
10/21/75 - P.M.	p. 41 (3527) lines 14-18
9/4/75 - P.M.	p. 34 (3042) line 4

Questions Improper as to Form (Particularly Ambiguous, Argumentative)

7/24/75	p. 33 (2496) lines 16-17
	p. 41 (2505) lines 9-10
7/29/75 - A.M.	p. 37 (2558) line 25 - p. 38 (2559) line 4
7/29/75 - P.M.	p. 62 (2628) lines 8-10
7/31/75 - A.M.	p. 95 (2728) line 10
7/31/75 - P.M.	p. 25 (2755) line 19 - p. 26 (2756) line 13
9/4/75 - A.M.	p. 59 (2981) lines 13-15
	p. 64 (2986) lines 12-13
	p. 78 (3000) lines 18-21
9/4/75 - P.M.	p. 34 (3042) lines 15-16
	p. 35 (3043) lines 12-16
	p. 62 (3071) lines 3-6, 21-24
9/9/75 - A.M.	p. 3 (3085) lines 11-12
	p. 43 (3125) lines 11-16, 22-24
	p. 44 (3126) lines 4-7, 11-13, 19-21
	p. 45 (3127) lines 15-18, 20-23

A 9376

Violations of Work Product Privilege

7/29/75 - A.M.	p. 38 (2559) lines 7-13
	p. 39 (2560) lines 4-13
9/4/75 - A.M.	pp. 70-72 (2992-2994) line 21 et seq.
9/11/75 - A.M.	p. 22 (3226) lines 16-. .
10/21/75 - P.M.	p. 58 (3544) lines 20-23
	pp. 60-61 (3546-3547) line 19 et seq.
	p. 62 (3548) lines 20-25

A 9377

10/21/75 - P.M.	p. 86 (3290) lines 9-14
	pp. 92-94 (3296-3298) lines 19 et seq.
10/21/75 - A.M.	p. 17 (3448) lines 3-21
10/21/75 - P.M.	pp. 62-64 lines 23 et seq.

A 9378

OCT 1 0 1976
S. D. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : 75 ~~Civ.~~ CRIM. 1023 (CMM)

v. : SUPPLEMENTAL AFFIDAVIT IN OPPOSITION TO OFFER OF GRAND JURY TESTIMONY OF SOLOMON H. FRIEND

AMREP CORPORATION, et al., :

Defendants. :

----------x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

LARRY M. LAVINSKY, being duly sworn, deposes and says:

1. This supplemental affidavit in opposition to the Government's offer of grand jury testimony of defendant Solomon H. Friend is made necessary by Ms. Hynes' letter of October 6, 1976 changing the portions of the testimony she proposes to read at trial.

2. While a number of excerpts previously designated have been dropped, including all of those referred to in paragraph 3 of my affidavit sworn to September 29, 1976, the basic Bruton problem remains. Throughout his grand jury testimony, Mr. Friend sought to exculpate himself by shifting the blame for allegedly misleading advertising to other defendants and to a period before he became Amrep's

general counsel. Ms. Hynes has carefully retained many excerpts designed to convey to the jury the impression that Amrep's own lawyer considered its previous advertising to be misleading. For example, in referring to an earlier version of a pamphlet Mr. Friend had asked his legal department to review, he stated:

> I believe there was references in there to selling prices of land in the Albuquerque area, which might have created the impression that those examples were directly applicable to Rio Rancho. (Testimony 7/24/75, p. 33, ll. 18-21)

Similarly, when questioned concerning a film which showed lots with curbs, gutters and sidewalks, Mr. Friend gave the following testimony:

> Q And when people buy a homesite lot and they are told that they can exchange into a building area, having seen that film, would you agree that they believe that they are entitled to a lot with sidewalks and a curb and gutter, wouldn't you?
>
> A I would say if a person just saw the film, and I want to be fair about it, he might get that impression.... (Testimony 7/31/75, Afternoon Session p. 22, ll. 5-11)

While eliminating the exerpt quoted at the top of page 3 of my earlier affidavit, Ms. Hynes has retained and still seeks

to read to the jury Mr. Friend's observation that:

> ... something can be misleading by your failure to disclose a material fact as well as the affirmative misrepresentation of a fact. And, I was very careful about this thing. (Testimony 7/31/75, Morning Session, p. 30, ll. 2-5)

3. The excerpts quoted in paragraph 4 of my previous affidavit have also been retained. In addition, on the subject of how long it will take to develop Rio Rancho, Ms. Hynes seeks to offer Mr. Friend's estimate that, based on the current rate of construction, it will take until the year 2150 to have 50,000 families at Rio Rancho. (Testimony 9/9/75, Afternoon Session, p. 100, ll. 12-20) On the subject of resale, Ms. Hynes has not only retained those portion of the testimony in which Mr. Friend speculates as to the existence of a resale market, she has also added the following:

> Q The reason you're saying that the company didn't disclose to the purchasers that there was no resale market for this land, even though they were selling it for investment, was that there was not a specific regulation that required them to; is that your testimony?
>
> A I would say that is about right. (Testimony 9/11/75, Morning Session, p. 84, ll. 8-13)

4. The above-quoted excerpts demonstrate that, absent a right to cross-examine Amrep's former general

counsel, Ms. Hynes' revised offer does not diminish the highly prejudicial impact upon the corporate defendants of the grand jury testimony she proposes to read at trial. Nor does the revision reduce the likelihood that Mr. Friend, as a part of his defense, will seek to read in other portions of his grand jury testimony, thereby exacerbating the prejudice to this former client.

5. Under these circumstances, Bruton v. United States and, indeed, fundamental concepts of fairness require that Mr. Friend's grand jury testimony be excluded in its entirety. Furthermore, as with the original offer, many of the excerpts in the revised offer are subject to a variety of objections which would in any event require their exclusion. For the convenience of the Court, there is annexed a revised schedule setting forth these objections.

For all of the reasons stated above and in my affidavit sworn to September 29, 1976, we urge that the proffered grand jury testimony of Solomon H. Friend not be received in evidence at a joint trial of Mr. Friend and his former client.

LARRY M. LAVINSKY

Sworn to before me this
12 day of October, 1976.

Notary Public

LOIS D. THOMPSON
NOTARY PUBLIC, State of New York
No. 41-0047250
Qualified in New York County
Commission Expires March 30, 1977

A 9382

Violations of Attorney-Client Privilege

7/24/75	p. 33 (2496) lines 16-21
	p. 49 (2513) lines 2-23
7/31/75 - A.M.	pp. 29-30 (2662-2663) lines 19 et seq.
9/4/75 - A.M.	pp. 70-72 (2992-2994) line 21 et seq.
10/21/75 - P.M.	pp. 62-64 lines 23 et seq.

A 9383

Violations of Work Product Privilege

9/4/75 - A.M.	pp. 70-72 (2992-2994) line 21 et seq.
10/21/75 - P.M.	p. 58 (3544) lines 20-23
	p. 60 (3546) lines 19-21
	p. 62 (3548) lines 20-25

A 9384

Testimony, Characterizations, Improper Comments by Prosecutor

7/24/75	p. 51 (2516) lines 11-15
9/11/75	p. 72 (3276) lines 6-16
	p. 84 (--) lines 8-12
10/21/75 - P.M.	p. 41 (3527) lines 14-18

Questions Improper as to Form (Particularly Ambiguous, Argumentative)

7/24/75	p. 33 (2496) lines 16-17
7/31/75 - A.M.	p. 95 (2728) line 10
9/4/75 - A.M.	p. 59 (2981) lines 13-15
	p. 78 (3000) lines 18-21
9/9/75 - A.M.	p. 3 (3085) lines 11-12
9/11/75 - P.M.	p. 69 (3273) lines 17-21
	p. 72 (3276) lines 6-7, 10-15
	p. 83 (3287) lines 8-11
10/21/75 - P.M.	p. 41 (3527) lines 14-18
	p. 42 (3528) lines 15-19

Lack of Adequate Foundation

7/31/75 - P.M.	pp. 10-12 (2740-2742) lines 17 et seq.
	p. 22 (2752) lines 5-14
9/4/75 - A.M.	p. 59 (2981) lines 13-18
	pp. 63-65 (2985-2987) lines 23 et seq.
	p. 70 (2992) line 21 through
	p. 74 (2996) line 14
9/9/75 - A.M.	pp. 2-7 (3084-3089) lines 15 et seq.
9/9/75 - P.M.	pp. 100-101 (3182-3183) lines 10 et seq.
	p. 118 (3200) lines 10-23
9/11/75 - A.M.	pp. 58-61 (3262-3265) lines 8 et seq.
	p. 72 (3276) lines 6-9
	p. 75 (3279) lines 12-15
	p. 77 (3281) lines 10-17

Prejudicial, Inflammatory Statements

7/24/75	p. 10 (2472) lines 18-20
	p. 11 (2473) lines 11-20
	p. 13 (2475) lines 2-11
9/11/75 - P.M.	p. 58 (3262) lines 6-7
	p. 59 (3263) line 6
	p. 60 (3264) lines 20-25
	p. 61 (3265) lines 4-8

Hearsay Within Hearsay

9/9/75 - A.M. pp. 2-7 (3084-3089) lines 15 et seq.

9/11/75 - A.M. pp. 2-4 (3206-3208) lines 11 et seq.

9/4/75 - A.M. p. 74 (2996) lines 4-8

A 9389

Irrelevant

7/24/75	p. 10 (2472) lines 18-20
	p. 11 (2473) lines 11-20
	p. 13 (2475) lines 2-11

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, :

-against- :

S 76 Cr. 644 (CMM)

AMREP CORPORATION, et al., :

Defendants. :

----------X

MEMORANDUM IN OPPOSITION TO THE INTRODUCTION OF THE GRAND JURY TESTIMONY OF SOLOMON H. FRIEND IN A JOINT TRIAL

POINT I

The Introduction of Friend's Grand Jury Testimony in a Joint Trial Would Violate Bruton v. United States, 391 U.S. 123 (1968).

Virtually every passage of the grand jury testimony of Solomon Friend which the government seeks to introduce into evidence* contains language which, assuming the government theory of prosecution has any viability whatever, the jury could interpret as incriminatory of the other defendants on trial. The relationship of Friend -- the defendants' lawyer -- to the defendants and the nature of his testimony renders it

*In fact, Mr. Friend may well seek to introduce into evidence other portions of his grand jury testimony, to put in context and explain those portions which the government introduces. We cannot fully address ourselves to the problems which may arise

functionally not possible to isolate out portions of it which apply only to him. Redaction in any meaningful sense is simply not feasible. There is no way to escape the classic Bruton problem which appears in this case in an especially heinous and offensive manner. There is, therefore, a "substantial risk that the jury,' despite cautionary instructions that it can only consider the testimony against Mr. Friend, will look "to the incriminating extrajudicial statements in determining" the guilt of the other defendants. The admission of Mr. Friend's grand jury testimony in a joint trial thus violates the other defendants'" right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." Bruton v. United States, 391 U.S. 123, 126 (1968).

Bruton and other cases recognize that a cautionary instruction to the jury to consider the testimony only against

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(footnote contd)
from the portions which Mr. Friend may seek to introduce, but scattered throughout his grand jury testimony are efforts by Mr. Friend to take credit for what was good about AMREP and to shift the blame for anything which was arguably bad in the view of the government, to the defendants who were with the company before he joined it. For example Mr. Friend testified:

> Complaints were so to speak, coming out of the woodwork. But they were complaints that had been -- that were arising from sales that were made prior to the time that I joined the company. 7-29-75, p.m. session at 10 line 5.

He also testified:

> I worked my rear end off trying to get this company to do something right. 7-31-75, a.m. session at 97 line 14.

Mr. Friend is "a futile collocation of words." Bruton v. United States, supra, 391 U.S. at 129 citing Delli Paoli v. United States, 352 U.S. 232, 247 (1957); La Belle v. Mancusi, 404 F. 2d 30 (2d Cir. 1968); United States v. Jones, 402 F. 2d 851 (2d Cir. 1968); United States v. Bozza, 365 F. 2d 206 (2d Cir. 1966); United States v. Sanchez, 532 F. 2d 155 (9th Cir. 1976). See, Jackson v. Denno, 378 U.S. 368 (1964). A cautionary instruction would be particularly futile here because Mr. Friend was the attorney for other defendants and a jury is very likely to view him as representing them in what he said. The only viable alternatives are a separate trial of Mr. Friend or not introducing the grand jury testimony of Friend into evidence in a joint trial. United States v. Glover, 506 F. 2d 291 (2d Cir. 1974).

In Bruton, the issue for the jury to decide was the identity of the robbers and the co-defendant's statement was incriminatory of Bruton on this point. In the instant case the question for the jury to decide is whether the actions of the defendants amount to a crime, and the grand jury testimony of Mr. Friend will be used by the jury against the other defendants in their decision on this issue. Ms. Hynes, by her offer of redaction, seems to feel that if the co-defendants' names are not mentioned, the grand jury testimony will not incriminate the other defendants and the Bruton problem will be solved.

Attempting to solve the problem by redaction often fails in its purpose because even a redacted version of the statement of a co-defendant can incriminate other defendants.* LaBelle v. Mancusi, supra; United States v. Bozza, supra; see Bruton v. United States, supra, 391 U.S. at 134 n. 10. That is particularly so here. In Bruton, the issue was: who committed the act which everyone acknowledged amounted to a crime. In a trial where identity is the issue, a statement which is redacted so as to remove completely all data which identify the co-defendant as the co-participant, may not incriminate him. The issue here, however, is whether acts committed by various defendants with recognized positions in a public corporation amount to a crime. The government seeks to introduce Friend's grand jury testimony because it believes that it is incriminatory, that is, it believes the testimony tends to prove, the criminality of the acts engaged in. Deletion of the names of the co-defendants thus does not solve the Bruton problem.

---

*Complete redaction here would make much of Mr. Friend's testimony meaningless. In many places Mr. Friend refers to "the company," a defendant in this case. In others he uses the word "they" to refer to the people in charge of the AMREP Corporation, that is, the individual defendants in the case. See e.g., p. 3000 at line 7; p. 3128 at line 22; p. 3248 at lines 20-21; p. 3448 at line 19. Also at p. 3001 Mr. Friend recounts that the lawyers got certain information in the possession of the government from their clients, obviously the individual defendants.

The transparency of Ms. Hynes' position can be elucidated by comparing allegations in the indictment with Mr. Friend's grand jury testimony. The testimony of Mr. Friend, if believed by the jury, is conceivably probative on a number of allegations in the indictment, and yet none of the defendants can cross-examine Mr. Friend as to what he meant by his statements. A few examples are:

1. Indictment: "there was virtually no resale market for these lots" (¶16[i]. See also ¶17[s][i]).
Friend: "there generally was no resale market" (p. 2513 at line 22. See also p. 2517 at line 16, p. 2609 at line 5, p. 3281 at line 12.)

2. Indictment: the lots sold were represented to be "safe and secure financial investments" (¶13. See also ¶s 15, 16, 17[p]).
Friend: "before they were selling primarily for use, it was sold as an investment." (p. 3000 at lines 7-8.). Up until 1972, "they had been selling for investment" (p. 3266 lines 2-3).

3. Indictment: "the defendants and their co-schemers had not improved, and were not improving, the lots being sold with water, utilities and other customary amenities, but rather were making such improvements only in small company-owned 'building areas'" (¶16[ii]. See also ¶15, 17[s][viii]).
Friend: "There is no question that the company is not extending utilities to the remote areas, or they are extending it basically in the area of the exchange" which is the company owned building area (p. 3046 at lines 22-25. See also pp. 2734 at lines 13-16, 3045 at lines 10-14.). Q. Only after 80 years would the company "start bringing utilities to lots other than the building areas," correct? A. Correct. So what? (p. 3200 at lines 17-23).

4. Indictment: "all purchasers of 'homesite' lots could in no event exchange their lots for lots with utilities since not enough land was set aside in company-owned 'building areas' for that purpose" (¶14).
Friend: Q. There are not "enough lots set aside in your building areas. . . to allow each lot that has been sold to be exchanged into a building area. A. Well, I think the

the arithmetic speaks for itself. You are correct." (p. 3192 at lines 16-21.).

5. Indictment: "there was sufficient land for development in Albuquerque or closer to it than Rio Rancho Estates to satisfy the most optimistic long-range growth projections for Albuquerque;. . Rio Rancho Estates was not in the necessary or only possible direction in which Albuquerque could be expected to grow" (¶17 [s][ii] and [iii]).

Friend: At pp. 3262-3265 Mr. Friend discusses two land developments with available land between Rio Rancho Estates and Albuquerque. At pp. 3227-3228 Mr. Friend says that in 1970 there was land available for development in the northeast of Albuquerque, and he discusses available land to the northwest of Albuquerque.

6. Indictment: Defendants and their co-schemers misled customers "into believing that increases in land values in the Albuquerque metropolitan area were a valid basis of comparison to, and were indicative of, purported increases in land values of lots in Rio Rancho Estates." (¶17[r]), whereas AMREP purchased part of Rio Rancho at $178 per acre in 1961 and purchased additional acreage from 1969 through 1971 at $180 per acre. (¶17 [s][vi]).

Friend: Even though "land prices in Albuquerque have redoubled and redoubled again and again, you cannot. . .imply. . . the same thing could happen to Rio Rancho" (p. 3224 at lines 17-21. See also pp. 3244 at lines 17-22, 3290 at lines 11-14). "Q. in a ten year period, the company had paid $2 more per acre for additional land that formed part of the subdivision; is that correct? A. That is true." (p. 3276 at lines 13-16.)

7. Indictment: "'commercial,' 'multi-dwelling' and 'ranchette' lots. . . lacked access to utilities;. . . such lots could not be exchanged for a lot with utilities in a company-owned 'building area'" (¶17).

Friend: At pp. 3544, 3546 and 3548-3549 Mr. Friend says that commercial, multi-dwelling and ranchette lots were not provided with utilities and could not be exchanged for a lot with utilities.

8. Indictment: the exchange "privilege was set up so that only a single half-acre 'homesite' lot could be exchanged for a 'building area' lot and the person exchanging had to retain any excess land." (¶14.)

Friend: "The exchange only allows the customer to

exchange one half acre. . . I felt it was unfair to sell a guy a five-acre lot, and then when he wants to build, he has to keep four and a half." (p. 3550 at lines 7-10.)

Additionally at a number of places in his grand jury testimony Mr. Friend, in an effort to explain changes which he had made in company literature, characterizes the earlier literature of his clients as incorrect, misleading, or giving a wrong impression. See e.g., p. 2496 at lines 18-21, p. 2752 at lines 10-11, pp. 3038-3039, p. 3070 at lines 6-24, p. 3237 at lines 14-23, p. 3241 at lines 23-25, p. 3244 at lines 17-22, p. 3291 at lines 11-14, p. 3298 at lines 11-15. Thus the jury will be given the "legal opinion" of the attorney for the company that misrepresentations (a major component of the alleged criminality) were made, as charged in the indictment. These opinions would be put into evidence without the defendants being able to cross-examine the attorney about his conclusions -- how he reached those conclusions and whether he communicated them to his clients.

This is a classic case of one defendant placing the blame on the others. The credibility of Mr. Friend's grand jury testimony "is suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here,

does not testify and cannot be tested by cross-examination." Bruton v. United States, supra, 391 U.S. at 136. Mr. Friend's grand jury testimony should not be admitted into evidence in a joint trial with the other defendants.

POINT II

Nearly All of Friend's Grand Jury Testimony Contains Objectionable Questions and Answers Which Are Inadmissible at Trial

Aside from the serious Bruton problems raised, the portions of Friend's grand jury testimony the government wishes to introduce is riddled with argumentative passages, prejudicial quips, hearsay within hearsay, opinions and speculation, prejudicial comments by the prosecutor, intrusions into attorney-client conversations, prejudicial comments out of context, and questions by the prosecutor loaded with summation rhetoric. The improper prejudicial effect of the government's introduction of its select portion of testimony over such objections is immeasurably enhanced by the very real prospect of Mr. Friend or other defendants reading into evidence the balance of Friend's grand jury testimony.

1. Argumentative Passages and Prejudicial Quips

Friend's testimony before the grand jury contains countless argumentative banters between Friend and Ms. Hynes. When Friend expressed a doubt on a particular question, he was attacked by Hynes because he was a senior vice president and officer (2505, lines 16-20). When Friend attempted to expand on answers, he was cut off by Ms. Hynes' remarks that she already knew what he was about to say (2727, lines 19-20).

In response to Friend's explanation that dirt roads were

standard county roads and that the sales materials made that fact clear, Hynes quipped: "Someone reading that is supposed to understand that is a dirt road?" (2755, lines 23-24).

Hynes also structured her grand jury questions with sarcasm (see, e.g., 2995, lines 20-22; 3192, lines 9, 13-14), ridicule (3000, lines 18-21),* demands that Friend answer questions he already had (3264, line 18), rhetorical comments (3285, lines 2-6), and petulant objections to Friend's answers (3287, line 2). For example, Hynes proposes to read the following to the jury (3286, lines 24-25; 3287, line 2):

> "Q. What is a long term investment, let's define that?
>
> A. The regulations allow you --
>
> Q. I don't want to talk about regulations, Mr. Friend."

In addition, several times during Friend's testimony, Hynes ordered him to "stop" (see, e.g., 2754, line 8; 2754, line 22; 3128, line 6; 3128, line 4).

Moreover, comments made before the grand jury by both Friend and Hynes which are irrelevant and prejudicial should be omitted.

For example, Friend's testimony concerning his discussions with Edward B. Winslow regarding HUD filings contained the following (2663, lines 6-11):

> "So, I called Ed, and he said, Sol, you are right, let's review the whole thing from scratch.

---

*At one point in his testimony, Mr. Friend was asked to locate a passage in a New York Offering Statement. Hynes snapped: "It's not too easy to find, is it, Mr. Friend?" (2516, line 11.)

> Ed searched his files, and he said, you know, I did write that language.
>
> I said, look, Eddie--I said 'Eddie,' because Eddie is my friend."
>
> (See also, 3200, line 23.)

On another occasion, Hynes quipped that she was asking the questions and her questions were "perfectly reasonable . . . to ask" (3528, lines 15-[illegible]).

Such prejudicial banter, obviously commonplace in the closed grand jury room, must be kept out of evidence at trial.

2. Hearsay

Friend's grand jury testimony is itself hearsay. Within that hearsay, however, are many other additional instances of hearsay which are inadmissible (see, e.g., 2496, lines 2-7; 2513, lines 4-6; 2517, lines 8-9; 2558, lines 11, 13-15, 17-18, 21-22; 2561, lines 17-19, 20-25; 2742, lines 3-7; 2751, lines 24-25; 3087, lines 22-25; 3088, line 2).

As an example, Hynes questioned Friend about building at Rio Rancho (3084, lines 15-20). Following four pages of testimony (3084-3087), Friend testified that his information was fifth degree hearsay (3087, lines 21-25; 3088, line 2):

> "I received these figures. Joan Dacey requested -- I requested of Joan Dacey that she provide me with this information. She passed it on to Ted. Ted passed it on to David Waldman. He passed it on to Larry Pearlmutter. When they got the information they gave it to me."

3. Friend's Speculation and Opinion

Throughout the testimony, Friend is called upon to speculate and give his opinions about various matters: how customers would interpret advertising (2752, lines 4-9; 3042, lines 10-14; 3071, lines 3-25); his "honest belief" and "honest opinion" when Rio Rancho would become fully developed (2985, lines 23-25; 2986, lines 2-11, 17-25; 3182, lines 8-25; 3183, lines 2-5); his "honest belief" how many people would be in Rio Rancho in the next 10 to 15 years (2992, lines 12-25; 2993, lines 2-25; 2994, lines 2-25); his characterization of what developments there was at Rio Rancho (3277, lines 19-25; 3278, lines 2-12).

4. Hynes' Prejudicial Comments

On several occasions, Hynes prefaced her questions to Friend by an announcement that the particular area of questioning was "very important" and that the grand jury was particularly interested in the answers. Thus, the prosecutor proposes to read these statements to the jury (2998, lines 10-13):

> "Mr. Friend, we have hit on a very important matter for the Grand Jury.
> It is very important that you answer this question and not deviate and get into a discussion."

On page 3000, lines 23-25, Hynes comments:

> "Then this is a very important matter that we are on now and it is very important for you to give us precise answers to the questions that are being put to you."

And on another occasion, Ms. Hynes told Mr. Friend the following (3250, lines 6-8):

> "That is not my question. It is very important to the Grand Jury, the Grand Jury is concerned that you answer my questions and not restate it."

Hynes also plans to inform the jury that Friend testified in the grand jury knowing he was a target having waived his Fifth Amendment privilege against self-incrimination (3084, lines 10-14):

> "Mr. Friend, you are appearing before this Grand Jury and have appeared on several other occasions. You have been told that you are a target of this investigation. You waived your Fifth Amendment privilege and testified, and that testimony is continuing."

These objectionable statements by Hynes may not be read to the jury.

5. Invasions into Attorney/Client Conversations

The most objectionable aspect of Friend's grand jury testimony is that a major portion of it is an in-depth search by Hynes into Friend's legal advice to his clients, the underlying reasons he had for giving such advice, the reasons he had for not giving contrary advice, and how and why he arrived at certain legal judgments (see, e.g., 3001, lines 12-24; 3037-2071; 3219-3229; 3232-3261; 3448, lines 3-21).

A large portion of Friend's testimony relates to changes he advised his clients to make in advertising and various scripts. With respect to each advised change, Friend was questioned about his reasons for the change, his legal judgment about the impact of the change, his legal judgment about the particular advertising or script prior to the change, his reasons and judgment for not having

recommended other changes. In short, Hynes secured from Friend in the confines of the grand jury room, page after page of testimony regarding his legal reasoning, judgments, and advice.

In denying AMREP's motion to sever Friend made on the ground that privileged communications between Friend and his clients would necessarily come out at trial, this Court ruled that such communications would not be privileged once the government proves a prima facie case that Friend "was a participant with AMREP in criminal acitivity" (Metzner, J., July 22, 1976, opinion denying AMREP's motion to sever Friend, p. 3). However, that decision was premised upon the fact that Friend would not need to break the privilege in order to defend himself unless he is called upon to present a defense following the close of the government's case. This Court wrote (id.):

> "Communications between Friend and AMREP prior to the institution of the investigations may not be privileged since it is alleged that he was a participant with AMREP in criminal activity. If true, the privilege disappears on trial. (Citations omitted.) Of course, a prima facie case must first be established against the parties. That point, however, will be reached at the close of the government's case and before Friend is called upon to present a defense." (Emphasis supplied.)

The prosecution now seeks to introduce Friend's grand jury testimony which is rife with breaches of the attorney/client privilege*

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*At one point in his testimony, Friend clearly stated his intention to breach the privilege, stating:

on its direct case -- well before Friend is called upon to present a defense. Under such circumstances, the government must be barred from reading Friend's grand jury testimony on its direct case. At the very least, Friend's testimony may not be utilized by the government in attempting to establish the prima facie case this Court suggested might result in "the privilege disappear[ing]" (id.).

Defendants Howard Friedman and Henry Hoffman join in the motions made by other defendants in this case objecting to the introduction of Friend's testimony insofar as applicable.

CONCLUSION

The government should be prohibited from introducing Friend's grand jury testimony on its direct case.

DATED: New York, New York
September 29, 1976

Respectfully submitted,

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Attorneys for Defendants
Howard Friedman
Henry Hoffman
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New York, New York 10017

OF COUNSEL
Stanley S. Arkin
Mark S. Arisohn
Lee Cross

(footnote contd)

"I don't care if it is privileged or not privileged. I want you to know what I did." (July 29, 1975, Afternoon session, p. 21, line 8.)

A 9405

U.S. DISTRICT COURT
OCT 13 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, : AFFIDAVIT

-against- :

S 76 Cr. 644 (CMM)

AMREP CORPORATION, et al., :

Defendants. :

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

Stanley S. Arkin, being duly sworn, deposes and says:

1. I am a member of the firm of Stanley S. Arkin, p.c. We represent Howard Friedman and Henry Hoffman, defendants in the above entitled case.

2. Ten days after the government was required by this Court to designate those portions of the grand jury testimony of Solomon H. Friend which it intended to introduce at trial, and following the defendants' submission to this Court of their objections to the grand jury testimony sought to be introduced, the government redesignated the portions of Friend's testimony. While deleting certain testimony and adding new testimony, the government's new designation does nothing to eliminate the substantial problems which will arise under Bruton v. United States, 391 U.S. 123 (1968), i. such testimony is read to the jury in a joint trial. In our initial brief, at pp. 5-7, we gave a few examples of the many instances where the testimony of Mr. Friend might improperly be used by a jury as evidence on a number of the allegations of the indictment against the other defendants. Most of the examples we gave remain in the new

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designation of testimony. A cursory comparison of the indictment and the designated portions of the grand jury testimony of Friend demonstrates that the government is seeking through a back door improper route to prove numerous specific allegations of the indictment against all the defendants by reading to the jury carefully selected sections of Friend's testimony, admissible if at all, only against him.

3. When an out-of-court statement is admitted against the defendant who made the statement, he can always decide to testify on his own behalf and elaborate on his statement. Mr. Friend's co-defendants cannot call him as a witness, however, to ask him about events and documents which disprove the allegations of the indictment, something the government was not at all interested in doing in the grand jury. Additionally, Friend's motive in testifying in the grand jury was to exculpate himself at all costs, even at the expense of shifting the blame for anything arguably criminal to his then clients and present co-defendants. See United States v. Kelly, 349 F. 2d 720, 758 (1965), cert. denied, 384 U.S. 947 (1966) (pre-Bruton). Ms. Hynes did not explore Friend's unfortunate emotional state or his bias in interrogating Friend in the grand jury since she was perfectly delighted to have him testify against his own clients. If his grand jury testimony is read to a jury, we will not be able to prove this bias or emotional instability with Mr. Friend because he will not be subject to cross-examination. By reading the Friend grand jury testimony the government is attempting to give the jury the impression that, in AMREP's former attorney's considered opinion, its advertising was misleading until he corrected it. We cited a few examples in our initial brief of the numerous instances where Mr. Friend characterized the advertisements and

procedures his co-defendants had initiated as misleading, incorrect or unfair. Many of the characterizations cited as examples remain in the new designation of testimony.

4. If any testimony of Mr. Friend is to be put before the jury, it should be his testimony at trial where he would be permitted to complete his answers to the questions asked of him, a courtesy often denied to him in the grand jury. Any testimony of Mr. Friend's which a jury hears should be without the bullying and the sarcastic quips and prejudicial statements which abound in his grand jury testimony. In the grand jury Mr. Friend, in his panic-stricken, confused state, was encouraged to testify to hearsay and to give his speculations and off-hand opinions. None of such testimony is properly admissible. We have given a few examples in our initial brief of the many times when these abuses occurred in the grand jury. Most of the examples we used remain in the new designation of testimony and there are many others we did not cite specifically.

5. For the reasons cited in our initial brief, this affidavit and the briefs and affidavits filed by counsel for the co-defendants, the government should not be permitted to introduce in evidence any of the grand jury testimony of Solomon N. Friend in a joint trial.

Stanley B. Arkin

Sworn to before me this
[illegible] day of October, 1976.

Notary Public

[illegible]
Commission Expires March 30, 1976

A 9408

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	S 76 Cr. 644 (CMM)
v.	:	OBJECTIONS OF DEFENDANTS CARITY AND DANIEL FRIEDMAN TO PROSECUTION'S FURTHER OFFER OF FRIEND'S GRAND JURY TESTIMONY
AMREP CORPORATION, et al.,	:	
Defendants.	:	

1. Defendants Carity and Daniel Friedman join in the position of the Corporate defendants as expressed in the Supplemental Affidavit of Larry M. Lavinsky, Esq., dated October 12, 1976.

2. Defendants Carity and Daniel Friedman also join in the specific objections made on behalf of the the Corporate defendants as set forth in the schedule annexed to Mr. Lavinsky's affidavit.

CURTIS, MALLET-PREVOST,
COLT & MOSLE

By _____
A Member of the Firm
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(212) 248-8111

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	
-v-	S 76 Cr. 644 (CMM)
AMREP CORPORATION, et al.,	
Defendants.	

OBJECTIONS OF DEFENDANTS CARITY AND DANIEL FRIEDMAN TO OFFER OF DEFENDANT FRIEND'S GRAND JURY TESTIMONY

Defendants Carity and Daniel Friedman join in the objections to prosecution's offer of selected portions of defendant Friend's grand jury testimony made on behalf of the corporate defendants by their counsel, Proskauer, Rose, Goetz & Mendelsohn.

Dated: New York, New York
October 1, 1976

Respectfully submitted,

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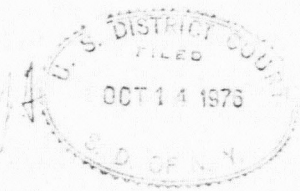
A 9410



UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA : S 76 Cr. 644 (CLB)

v. :

AMREP CORPORATION, et al., :

- x

Defendant objects to the government's supplemental objections of October 27, 1975, as revised November 3, 1975, to defendant's grand jury testimony which it proposes to read at the trial of the above action. The principal and recurring objection, which has not been withdrawn by the government's latest revision, is that the designated extracts are incomplete and thus misleading. In the Appendix attached to defendant's original objections, we have indicated portions which we believe should be added if the government's proposed extracts are admitted.

7/24/75

Page 10, lines 18-25, page 11, lines 11-25, and page 13, lines 2-13, are objected to as irrelevant.

Page 14, lines 6-17, and page 15, lines 2-6, are objected to as misleading and incomplete, unless supplemented by the omitted passage at page 14, lines 18-25, and continued on page 15, lines 7-17.

7/29/75 P.M.

Page 41, lines 6-25, and continuing through page 43, lines 2-17, is incomplete and misleading unless supplemented to include page 43, lines 18-21.

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7/31/75 A.M.

Page 29, lines 19-25, and page 30, lines 2-5, is incomplete and misleading without the preceding questions and answers at page 29, lines 2-18, and the succeeding questions and answers at page 30, lines 6-18.

Page 96, lines 9-11, is objectionable in that it fails to specify to specify which "promotional film" is referred to by the prosecutor.

7/31/75 P.M.

Page 10, line 12 through page 12, line 2 is irrelevant.

Page 21, lines 4-20, is incomplete and misleading without lines 21-25.

Page 22, line 2 through page 25, line 18, is incomplete and misleading without the continuation, from page 25, line 19 through page 26, line 11.

9/4/75 A.M.

Page 59, lines 13-18, is incomplete and misleading without the subsequent question and answer, lines 19-20.

Page 63, lines 23-25, and continuing through page 65, lines 2-15, is incomplete and misleading without the following question and answer at lines 17-25 on page 65. However, the comment of the prosecutor at page 65, line 16, is not a proper part of the question, and should be deleted.

All of the designated passages beginning at page 70, lines 12-25, and continuing through page 80, lines 2-4, are irrelevant and incompetent. The material referred to consists of testimony and argument by the prosecutor rather than the

witness. Further, the passages designated contain improper cross-examination of the witness with respect to statements made by other attorneys, as to which the witness disclaimed any personal knowledge.

9/9/75 P.M.

Page 118, lines 10-23, is incomplete and misleading without the fol-owing questions and answers from page 118, line 24, through page 119, line 21.

9/11/75 P.M.

Page 60, lines 18-20, is improper in form, and should be deleted.

The portions designated at pages 69 through 74 are irrelevant, and also contain improper colloquy and argument by the prosecutor. Moreover, if the portion of page 72 is read, the portions of Friend's testimony at page 76, line 5 through page 77, line 6 and page 88, lines 7 through 24 should also be read, to convey a complete and accurate representation of Friend's testimony regarding the matter in issue.

Page 83 is incomplete, and should be read in context with page 84, line 24, through page 85, line 9.

Page 84, lines 8-13, is objectionable in form. The question assumes facts which are contrary to the record. See page 81, line 25, through page 82, line 9, and page 84, line 14 through page 85, line 9.

10/21/75 P.M.

Page 39, line 19, through page 42, line 21 is objected to as irrelevant and immaterial.

General Objections

1. Friend's entire grand jury testimony is tainted and inadmissible by reason of the government's improper failure to warn him, on January 28, 1975, that he was a target of the underlying investigation.

2. As appears from the instances set forth above, the selected and truncated passages designated by the government present an unfair and misleading version of defendant Friend's entire grand jury testimony. In the event any of the testimony is read, defendant submits that the additional passages specified above should be read, at the time the government reads the portions of the testimony which it has designated. In the event that this is not done, defendant Friend presently intends to read such additional portions during the presentation of his case.

3. Certain pages of transcript which were attached to the government's designation of September 27, 1976 have not been listed, either in that document or in the revised designation of October 6, 1976. If and when any portions thereof are actually designated by the government, defendant Friend reserves the right to object thereto.

Dated: New York, New York
October 13, 1976.

Respectfully submitted,

ROGERS & WELLS

By _____
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	S 76 Cr. 644 (CMM)
v.	:	
AMREP CORPORATION, et al.,	:	
Defendants.	:	

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF OBJECTIONS BY DEFENDANT SOLOMON H. FRIEND TO GOVERNMENT DESIGNATION OF GRAND JURY TESTIMONY

On September 27, 1976, the government designated portions of the grand jury testimony of defendant Friend which it then proposed to offer at the trial. The material designated by the government at that time was, in large part, clearly and grossly improper. As set forth in the objections previously filed by defendant Friend, and the memorandum submitted therewith, the material originally submitted included not only questions which were argumentative or otherwise improper in form, and called for speculation and opinion, but also extensive statements, arguments, and gratuitous comments by the prosecutor. In its second designation of grand jury testimony, served on October 6, the government has now deleted a number of the passages which were most clearly improper on their face.

The revised designation, however, still contains a large amount of improper material, and some objectionable material has actually been added in the government's most recent selection. The revised designation, in its entirety, is also still subject to the general objections set forth in defendant Friend's previous memorandum. For convenient reference, a revised schedule of objections, keyed to the second designation, is submitted herewith.

One addition to the government's designation is improper in form, and grossly out of context. From the testimony on September 11, 1975, the government has now designated the following question and answer, which was not included in its previous list (page 84):

> "Q The reason you're saying that the company didn't disclose to the purchasers that there was no resale market for this land, even though they were selling it for investment, was that there was not a specific regulation that required them to; is that your testimony?
>
> "A I would say that is about right."

The statement contained in the prosecutor's question, that the company "didn't disclose" the absence of a resale market, is apparently based on the fact that the absence of a resale market is not discussed in certain advertising materials. Just before the quoted testimony, however, the witness had pointed out that the absence of a resale market <u>was</u> disclosed in the property report which was given to purchasers (pages 81-82):

"Q Why wasn't there a statement like that in the promotional material and the sales film which the customer saw and was given?

"A Miss Hynes, the only answer I can give you is that the statement was not required to be made as an affirmative statement in literature because the regulations only required that it be put in the property report.

"Q Mr. Friend, there is --

"A And they were put in there."

And immediately following the excerpt designated by the government, the testimony again made clear that the absence of a resale market was disclosed in the property report (pages 84-85):

"Q Now, let me be clear on this. You are saying that you did advise the company to make this kind of disclosure in advertisements, or you did not?

"A I advised the company to be sure that no salesman --

"Q Advertisements, advertisements that come from the company, promotional material that come from the company, disclaimers in advertisements that the company --

"A I advised the advertising department who would write the ads that they could not imply in the advertising that there was a resale market.

"Q Did you advise them that there, in fact, is no resale market?

"A No, because it was not required by the regulation, but it was required to be disclosed in certain property reports, and I advised them to disclose it in the property reports, and they did disclose it in the property reports. Not everything that is in a property report is in advertising. Otherwise you would have to have an ad that is equal to the property report. This is the reason the government requires property reports."

Under these circumstances, reading the one question and answer designated by the government would be seriously misleading and prejudicial.

In other instances, the omissions from the government's revised designation would themselves be misleading, because the portions retained would be taken out of context. For example, the revised designation retains a portion of the testimony on the company's obligations with respect to improvements (7/31/75 P.M., pages 21-25), but now seeks to delete the following question and answer, in which Friend testified as to his reliance on the company's previous counsel (page 21, lines 21-25):

> "Q Mr. Friend, what I am asking you is how do you state that the company is not obligated to provide a lot with curbs and gutters and sidewalks?
>
> "A Because that is what Ed Winslow advised me was the concept, that is what he trained me on in my first six months."

This fact is clearly relevant to the issue of Mr. Friend's good faith, and if the rest of the testimony is to be used, it would be blatantly unfair to omit that portion.

The government now also seeks to omit the following testimony, which immediately follows the designated testimony on the subject of "dirt roads" (7/31/75 P.M., pages 21-26):

> "Q In the next sentence it [the booklet, "How to Live - Retire - Invest in the Sunny Southwest"] says, 'In addition, since we build engineered all weather roads property graded, <u>compacted</u> <u>soil</u> strengthened with bonding agents,

clay, caliche and rock material wherever necessary for grade durability.' [Emphasis supplied]

"Q Someone reading that is supposed to understand that is a dirt road?

"A Ms. Hynes, not only do I think it is accurate, the state thinks it is accurate, and the property report says the same thing.

Maybe we should have said, parentheses, this is not a paved road.

"Q Should it have said that, particularly since it is under a photograph of a paved sidewalk, Mr. Friend?

"A In the first place, this picture doesn't show the road at all, it just shows the house.

"Q It shows paving, doesn't it?

"A It shows a driveway, it does not show the road."

The fact that the company described the roads as "compacted soil" is obviously not helpful to the government's contention that purchasers were misled about the nature of the roads. If the testimony on this subject is to be admitted at all, the government should not be permitted to delete portions which it finds damaging to its case.

CONCLUSION

Defendant Friend again submits that the entire grand jury testimony should be excluded, for the reasons set forth in defendant's principal memorandum and objections. If any part of

the testimony is to be used, however, the government should not be permitted to make misleading and prejudicial use of quotations taken out of context.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA, :

- v - : S 76 Cr. 644 (CMM)

AMREP CORPORATION, et al., :

Defendants. :

- - - - - - - - - - - - - - - - - - - -x

GOVERNMENT'S MEMORANDUM OF LAW IN SUPPORT OF THE ADMISSIBILITY OF THE DEFENDANT FRIEND'S GRAND JURY TESTIMONY

INTRODUCTION

The corporate defendants and Solomon Friend, Howard Friedman and Henry Hoffman have filed objections to the admission of certain portions of Friend's grand jury testimony. These objections break down into two basic categories: those based upon alleged Bruton problems, and those based upon specific "evidentiary" claims. While all of these objections are without merit, some are totally frivolous. Pervading most of the specific objections is a complete lack of understanding of the use of a defendant's own statements when admitted against him in a criminal trial and a confusion of the differences between the interrogation of a criminal target and the

conduct of a civil deposition. Finally, the Government suggests that these objections must be placed in their proper context and perspective. Most are so absurd, or so legally ill-founded that not even the co-defendants saw fit to raise them.* Even the defendants who did object cannot agree on what is objectionable and why.

I. THE ADMISSION OF FRIEND'S GRAND JURY TESTIMONY IS PROPER UNDER BRUTON v. UNITED STATES, 391 U.S. 123 (1968).

The corporate defendants, and Howard Friedman and Henry Hoffman claim that Friend's grand jury testimony inculpates them under Bruton v. United States, 391 U.S. 123 (1968), and therefore is inadmissible. The corporate objections are incorrect because Friend's testimony as an officer, director and general counsel, constitutes an admission of the corporations, and because in the form offered it does not violate Bruton. The Friedman-Hoffman objections seek to expand Bruton beyond recognition and are without authority. Friend's testimony simply does not directly inculpate them. So misplaced are those objections that no other defendant has apparently deemed them worthy of consideration.

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* For the first time, the defendants Daniel Friedman and Chester Carity have filed objections to Friend's grand jury testimony by joining in the corporations' objections expressed in the Lavinsky supplemental affidavit dated October 12, 1976. The merits of their Bruton objections are disposed of by the analysis of the corporations' objections at Point I infra. As discussed at Point II infra, the individual defendants have no standing to raise other objections, which in any event are totally without merit.

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A. FRIEND'S TESTIMONY IS ADMISSIBLE AGAINST THE CORPORATIONS AS THAT OF A CORPORATE AGENT UNDER RULE 801(d)(2)(D), Fed. R. Evid.

The Government respectfully submits that Bruton v. United States, supra, cited by defendants as controlling, does not govern the facts of this case. In Bruton, a joint trial of two individuals defendants, a witness testified to a confession by one defendant which implicated another defendant as well. The trial court gave a limiting instruction which directed the jury to disregard the confession as to the other defendant. The Supreme Court held that such an instruction could not be relied upon to prevent prejudice to the non-declarant defendant who was implicated in the confession.

The facts of Bruton are far removed from the facts presented here. In this case we have an officer, director and general counsel of Amrep, an officer of Rio Rancho, and an officer and director of ATC making sworn statements before a grand jury about matters with which he was intimately familiar. Furthermore, unlike an individual, corporate criminal culpability derives not from any knowledge or acts of its own, but only from the knowledge and acts of its

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officers, directors and other human agents.* In this case the corporations' Bruton claims are without merit because the knowledge and acts of the defendant Friend are derivatively the knowledge and acts of the corporate defendants; and the statements of Friend with respect thereto are the statements of the corporations.

The admission of Friend's grand jury testimony against the corporation is specifically authorized by Rule 801 (d)(2)(D), Federal Rules of Evidence, which provides that the statements of an agent or employee concerning matters within the scope of his agency or employment are the statements of his principal, if made during the existence of the agency or employment relationship. Within the framework of the new Federal Rules of Evidence, Rule 801(d) unequivocably holds that statements such as Friend's are not hearsay, but substantive admissions of the principal when offered by an opposing party.

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* Corporate criminal liability does not turn on the rank or position of the employee who has committed the criminal offense, United States v. George Fish, Inc, 154 F.2d 798, 801 (2d Cir. 1946), citing N.Y. Central And H. R.R. v. United States, 212 U.S. 481 (1909); United States v. Armour and Co. 168 F.2d 342, 344 (3d Cir. 1948); accord, C.I.T. Corporation v. United States, 150 F.2d 85, 89 (9th Cir. 1945), as long as the intent, knowledge and willfulness elements of the offense are shown to exist on the part of the agent acting for the corporation. Boise Dodge, Inc., v. United States, 406 F.2d 771 (9th Cir. 1969); United States v. Carter, 311 F.2d 934, 941, 943 (6th Cir. 1963); Magnolia Motor and Logging Co., v. United States, 264 F.2d 950, 954 (9th Cir. 1959); American Medical Association v. United States, 130 F.2d 233 (D.C. Cir. 1942).

Although the traditional approach required a showing of actual authority to make the statement before the agent's statements were admissible as those of the principal, see e.g., Northern Oil Co. v. Socony Mobil Oil Co., 347 F.2d 81 (2d Cir. 1965), Rule 801(d)(2)(D) finally codified the trend of decisions and eliminated the need for any showing of authority to make the statements. All that is now required is a showing that the agent is still employed by the principal and that the statements concern matters within his role as agent.

As Judge Weinstein states in his treatise on the Federal Rules of Evidence:

> "[N]o longer need judges... analyze the particular factors to determine whether the statement in question should be admitted as an exception to, or extension of, the traditional rule. Once agency, and the making of the statement while the relationship continues, are established, the statement is exempt from the hearsay rule so long as it relates to a matter within the scope of the agency. '[T]he authority to do an act would conclusively imply authority to speak narratively about the act, if the utterance was made before the termination of the agency' [footnote omitted]. The status of the person to whom the declarant makes the statement is irrelevant to admissibility but may, of course bear on the credibility of the declarant or the witness and may be used for impeachment."

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4 Weinstein's Evidence ¶ 801(d)(2)(D) [01] at p. 801-137, and see cases discussed therein. See also United States v. Kahn, 472 F.2d 272, 289 n.21 (2d Cir.), cert. denied, 411 U.S. 982 (1973).

Judge Weinstein goes on to point out that the adoption of this approach is a practical response to the realities of the modern corporate world, focusing

> "on the practical need for pertinent evidence rather than on theoretical debates over the extent to which the substantive law of agency would permit a party to be bound by the statements of another. Rule 801(d)(2)(D), in adopting this approach reaffirms that relevancy is the keystone of the federal rules and that the ascertainment of truth is a primary goal. Based upon experience with litigation and the world, the draftsmen's judgement was that knowing about vicarious admissions would, on balance, be more helpful than harmful in determining truth."

4 Weinstein's Evidence ¶ 801(d)(2)[01] at 801-114-15. See also The Notes of the Advisory Committee on Rule 801, Fed. R. Evid., 28 U.S.C.A.

Moreover, in this case, Friend is no mere employee but is a central figure - a senior vice-president, director and general counsel - in control of the corporate defendants

at the time he appeared before the grand jury. There also will be ample proof that his testimony concerned matters of which he had first hand knowledge and dealt with on a regular basis within the scope of that employment. As such his grand jury statements are those of the corporate defendants; his testimony as to his knowledge, his acts and the manner in which the business of the corporate defendants was conducted is the testimony of the corporations. Accordingly, it is admissible against the corporation under Rule 801(d)(2)(D).

The confrontation problem raised by Bruton, where one defendant directly implicated another, is not present in this case. When Friend testified, the corporations testified, and the corporations have no need or right to confront themselves. They are in the same position as an individual whose statements are offered against him.

Furthermore, Bruton itself, and the Confrontation Clause upon which it is based, do not preclude the admission of all statements where the declarant is not subject to cross-examination at a subsequent trial. Bruton and its progeny have authorized the use of out-of-court statements far less reliable than Friend's grand jury testimony. Furthermore the Court in Bruton explicitly stated that there was not before it "any recognized exception to the hearsay

rule" and intimated "no view whatever that such exceptions necessarily raise questions under the Confrontation Clause." 391 U.S. at 128 n.3. The statements sought to be introduced in this case fall totally outside Bruton, since they are simply not hearsay statements, but are offered as substantive evidence against Friend and the corporations. Fed. Rules Evid., Rule 801(d).

The question left open by Bruton, whether out-of-court statements otherwise directly admissible against a defendant are admissible where the declarant does not testify, was answered affirmatively by Dutton v. Evans, 400 U.S. 1974 (1970). There the Supreme Court upheld the constitutionality of a Georgia rule of evidence which, unlike the federal rule, admitted the declarations of a co-conspirator during the concealment phase of the conspiracy. In Dutton, a witness testified to a statement made by the defendant's co-conspirator (who was not then on trial), after the substantive conspiracy had terminated, which statement directly incriminated the defendant. Although the witness who had heard the declaration was present and subject to cross-examination with respect to whether the statement had been made and, if so, the circum-

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stances under which he had heard the statement,* the declarant himself was never produced. The Court found no violation of the Confrontation Clause because of the presence of sufficient

> "indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant." 400 U.S. at 89.

The statement admitted in Dutton was made by the co-conspirator to a cellmate after the co-conspirator had been arraigned on the murder charges involving him and the defendant on trial. The co-conspirator said "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now." Under the Georgia hearsay statute, it was considered that this was made during part of the concealment phase of the crime. The Dutton Court held that there was

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* Unlike Dutton or Douglas v. Alabama, 380 U.S. 415 (1965), there can be of course, no question in the present case that the Friend statements were actually made. Friend's testimony was recorded contemporaneously by a Grand Jury stenographic reporter who is, if needed, available to testify.

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no constitutional bar to such statements, although this statement would not have been admissible under federal evidentiary principles under Lutwak v. United States, 344 U.S. 604 (1953), and Krulewitch v. United States, 336 U.S. 440 (1949). Perhaps most compelling is the fact that Friend's grand jury testimony surely would have been admissible under the Georgia statute relating to the concealment phase of the conspiracy. Accordingly, since Rule 801(d)(2)(D) provides a statutory basis for its use here, there can be no constitutional bar to its admission.

Similarly, in the line of cases represented by United States v. D'Amato, 493 F.2d 359, 365, (2d Cir. 1974); United States v. Puco, 476 F.2d 1099, reh. denied, 476 F.2d 1106 (2d Cir. 1973); and United States v. Weber, 437 F.2d 327 (3d Cir. 1970), cert. denied, 402 U.S. 932 (1971), both the Second and Third Circuits have concluded on the basis of Dutton that testimony by a witness as to what a coconspirator said to him, passes constitutional muster even though the declarant himself did not testify. See also, Mattox v. United States, 146 U.S. 140 (1892), (dying declarations), cited with approval by Dutton, supra, 400 U.S. at 80.

Underlying Dutton is the Court's determination that the statement was sufficiently reliable to obviate any confrontation requirement. Likewise, in passing the Rules of Evidence, Congress has determined that an agent's admissions are sufficiently reliable to merit their use against the

principal even absent specific authority to make the statement.

Finally, two of the examples in Mr. Lavinsky's affidavits still in dispute with the Government (pp. 2517 and 2986) do not involve anything which directly inculpates the corporations in a Bruton sense, but rather are statements of fact or knowledge by Friend which are admissible against the corporations under Rule 801(d)(2)(D). In these passages, Friend admits that development of Rio Rancho is in the distant future and that there is no resale market now or in the foreseeable future for investors wishing to sell their lots. Mr. Lavinsky's contention that Friend was in no position to make such statements ignores reality. First, this has nothing to do with Bruton. These passages simply show Friend's knowledge of or belief in certain facts. Secondly the Government will prove that Friend did far more than act as an attorney, and in the course of his relations with other officers and his daily activities personally dealt fully with such important facts. As for the remaining passage of Sept. 11, 1975, a.m., p. 84 (3288) lines 8-13, the following substitutions can be made: "you" for "the company"; "you" for "the "; and "you" for "them". In the

alternative, the question can be changed to read: "The reason you're saying that there were no disclosures to the purchasers that there was no resale market for this land, even though it was being sold for investment, was that there was not a specific regulation that required it; is that your testimony?"

Assuming some other uncited examples qualify as direct inculpations of the corporations, and assuming arguendo that this Court holds that such testimony conflicts with the corporations' Bruton rights despite Rule 801(d)(2)(D), it nevertheless does not follow that even those portions are not admissible. For the reasons set forth in detail at 14 infra, with respect to the Friedman-Hoffman Bruton objections, Friend's testimony can be redacted readily to eliminate references to the corporation which are directly inculpatory of the corporations.

B. FRIEND'S TESTIMONY DOES NOT VIOLATE THE BRUTON RIGHTS OF ANY INDIVIDUAL DEFENDANT.

The defendants Howard Friedman and Henry Hoffman make a blunderbuss Bruton objection which in essence claims that since Friend is inextricably tied to the corporations and their officers, it is inevitable that Friend's statements will be used directly against the other defendants. No other

individual defendants make this claim. Not only does Bruton offer little support for such a sweeping claim, but the facts in this case cannot support it.

In Bruton, supra, a witness testified that one defendant had confessed that he and Bruton committed an armed robbery. Bruton's co-defendant, protected by the Fifth Amendment, did not take the stand and could not be cross-examined about his extrajudicial statement that he and Bruton committed the crime. The Court held that the statements were properly admissible only against the person who made them and that instructions to the jury not to use the statements of one defendant against another are not an adequate substitute for a defendant's right of cross-examination. However, contrary to the defendants' assertion here that cautionary instructions are always useless, the Supreme Court has indicated that such cautionary instructions, though ineffective against "powerfully incriminatory" statements, may be effective in less severe circumstances. See Bruton, supra, 391 U.S. at 135. See also Frazier v. Cupp, 394 U.S. 731, 735 (1969).

"[C]autionary instructions are ineffective under Bruton only where the extrajudicial statement admitted into evidence is 'clearly inculpatory' as to the complaining co-defendant and is 'vitally important to the government's case.'" (emphasis added) United States v. Wingate, 520 F.2d

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30, 313 (2d Cir. 1975). See also United States v. Catalano, 491 F.2d 268, 273 (2d Cir.), cert. denied, 419 U.S. 825 (1974); United States v. Cassino, 467 F.2d 610, 623 (2d Cir. 1972), cert. denied, 410 U.S. 928 (1973).

In the present case, the statements made by defendant Friend to the grand jury are properly admissible because they are neither "clearly inculpatory" as to co-defendants nor "vitally important" to the case against them. Thus, a cautionary instruction to the jury to consider the statement only against Friend and the corporations and not against other defendants will be sufficient to protect the co-defendants' Sixth Amendment rights under Bruton. For the most part, Friend's testimony consists of statements of fact about his own knowledge and belief. It does not rise even to the level of indirect inculpation presented by United States v. Wingate, supra, and other such cases cited above and therefore it can properly be used by the Government. The defendants suggest a totally unsupportable extension of Bruton: namely, that a co-defendant's admission of significant facts which do not directly inculpate others somehow bars the use of such statements. Logic alone demands rejection of such a view since it would eliminate virtually all admissions in multi-defendant trials. Moreover, as set forth below, such a proposition has no legal authority.

Illustrative of the limits of Bruton as applied to this case is the recent case of United States v. Wingate, supra. In that case, defendant Wingate met with an agent in the Crotona Bar and told him that he had missed his "man" but that "[m]aybe my man will bring the package [of heroin] when he comes to the bar." Later on, the agent called Wingate at the Crotona Bar and arranged to meet him at the airport to negotiate the sale of heroin. Wingate told him that his "man" was with him and that he would bring his "man" to the airport. Wingate arrived at the airport with co-defendant Smith, and both were subsequently arrested. At trial, an agent was permitted to testify that after the arrest co-defendant Smith told him that he had been asked by "someone" at the Crotona Bar to get heroin for a customer, that he told him that he could obtain it, and that the two of them had driven to the airport to arrange things.

The Second Circuit held that Smith's statements were properly admitted along with a cautionary instruction to the jury to consider the statements only in relation to Smith and to disregard them as to Wingate. The Court said that Smith's statements were not clearly inculpatory because they alone did not serve to connect Wingate with the crime. Only when combined with other evidence did the statements tend to implicate Wingate. "[A] defendant's statement is admissible at a joint trial, with cautionary instructions,

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even though other evidence in the case indicates that an unmentioned co-defendant was also involved in the activities described in the statement." United States v. Wingate, supra, 520 F.2d at 314. See also United States v. Trudo, 449 F.2d 649, 652-3 (2d Cir. 1971), cert. denied, 405 U.S. 926 (1972); Posey v. United States, 416 F.2d 545, 550-51 (5th Cir. 1969), cert. denied, 397 U.S. 946 (1970); Slawek v. United States, 413 F.2d 957, 960-64 (8th Cir. 1969). Thus, Smith's words were not "powerfully incriminating" as to Wingate within the meaning of Bruton, and could be admitted against Smith at the joint trial with proper instructions to the jury.

Similarly, in United States ex rel. Nelson v. Follette, 430 F.2d 1055, 1058 (2d Cir. 1970), cert. denied, 401 U.S. 917 (1971), the Government introduced the confession of a co-defendant that he and one "Oliver" had committed a robbery, even though other evidence clearly indicated that Nelson was the "Oliver." The Second Circuit noted that "Biggins' statements were not clearly inculpatory because they alone did not serve to connect Nelson with the crime," and held that Nelson's Sixth Amendment rights under Bruton were not violated. See also United States v. Finkelstein, 526 F.2d 517, 528 (2d Cir. 1975).

The circumstances of this case fit clearly within the decisions in Wingate and Nelson, supra, and the other decisions cited. Nothing in Friend's testimony directly implicates the other defendants. Since Friend's testimony will not establish the role of other defendants and will not "alone" establish material facts involved in the case, it is clearly admissible against him.

II. THE SPECIFIC OBJECTIONS TO PASSAGES OF FRIEND'S GRAND JURY TESTIMONY ARE WITHOUT MERIT.

By letter dated October 6, 1976, the Government informed all defense counsel that it was making substantial reductions in the portions of defendant Friend's grand jury testimony which it would seek to offer as evidence. Accordingly, in light of these reductions, the following is a list of the specific passages to which defendants object concerning which there still is a dispute with the Government. The objections are listed by defendant and use the defendants' own characterizations (there is some overlap between defendants).

A. Objections of Solomon Friend

1. Irrelevant or Improper Questioning

7/24/75	p. 10 (2472) lines 18-25 p. 11 (2473) lines 11-20 p. 13 (2475) lines 2-13
7/31/75 P.M.	p. 10 (2740) lines 12-25 p. 11 (2741) lines 2-25 p. 12 (2742) line 2

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9/9/75 P.M. p. 118 (3200) lines 10-23

9/11/75 P.M. p. 72 (3276) lines 2-16
p. 83 (3287) lines 6-12

B. Objections of Howard Friedman and Henry Hoffman

1. Argumentative Passages and Prejudicial Quotes

7/31/75 A.M. p. 94 (2727) lines 19-20

7/31/75 P.M. p. 24 (2754) lines 8-22

9/4/75 P.M. p. 73 (2995) lines 20-22
p. 78 (3000) lines 18-21

9/9/75 P.M. p. 118 (3200) line 23

9/11/75 P.M. p. 60 (3264) line 18
p. 81 (3285) lines 2-6

10/21/75 P.M. p. 42 (3528) lines 15-16

2. Hearsay

7/24/75 p. 33 (2496) lines 2-7
p. 49 (2513) lines 4-6

9/9/75 A.M. p. 2 (3084) line 15 through
p. 6 (3088) line 25.

3. Friend's Speculation and Opinion

7/31/75 P.M. p.22 (2752) lines 4-9

9/4/75 A.M. p. 63 (2985) lines 23-25
p. 64 (2986) lines 2-7, 17-25
p. 70 (2992) lines 12-25
p. 71 (2993) lines 2-25
p. 72 (2994) lines 2-25

9/9/75 P.M. p. 100 (3182) lines 8-25
p. 101 (3182) lines 2-5

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9/4/75 A.M.	p. 70 (2992) line 12 through p. 78 (3000) line 22*
9/11/75 P.M.	p. 60 (3264) lines 18-20** p. 69 (3273) line 13 through p. 70 (3274) line 3 p. 71 (3275) line 22 through p. 72 (3276) line 16*** p. 84 (3288) lines 8-13
10/21/75	p. 39 (3525) line 19 through p. 42 (3528) line 21, exclusive of p. 41 (3527) line 8****

2. Misleading and Incomplete

7/24/75	p. 14 (2476) lines 6-17 p. 15 (2477) lines 2-6
7/29/75 P.M.	p. 41 (2607) lines 6-25 p. 42 (2608) lines 2-25 p. 43 (2609) lines 2-17
7/31/75 A.M.	p. 29 (2662) lines 19-25 p. 30 (2663) lines 2-5 p. 96 (2729) lines 9-11
7/31/75 P.M.	p. 21 (2751) lines 4-20 p. 22 (2752) lines 2-25
9/4/75 A.M.	p. 59 (2981) lines 13-18 p. 63 (2985) lines 23-25 p. 64 (2986) lines 2-7; 15-25 p. 65 (2987) lines 2-15*****

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* Friend objects to pages 79 and 80, but these have already been deleted.

** Friend did not object to this in his first set of objections.

*** Friend objects to pages 73 and 74, but these have already been deleted. He did not object to page 60 in his first set of objections.

**** Friend did not object to this in his first set of objections.

***** Friend objects to line 16, but this has not been designated.

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C. Objections of Corporate Defendants

1. Attorney-Client Privilege

7/24/75	p. 33 (2496) lines 16-21 p. 49 (2513) lines 2-23
7/31/75 A.M.	p. 29 (2662) lines 19-25 p. 30 (2663) lines 2-5
9/4/75 A.M.	p. 70 (2992) lines 19-25 p. 71 (2993) lines 2-25 p. 72 (2994) lines 2-21
10/21/75 A.M.	p. 62 (3348) lines 23-25 p. 63 (3349) lines 2-25 p. 64 (3350) lines 2-21

2. Work Product Privilege

9/4/75	pages specified above under attorney-client privilege
10/21/75 P.M.	p. 58 (3544) lines 20-23 p. 60 (3546) lines 19-21 p. 62 (3548) lines 20-25

3. Testimony, Characterizations, Improper Comments By Prosecutor*

9/11/75 P.M.	p. 71 (3275) lines 22-25 p. 72 (3276) lines 6-16 p. 84 (3288) lines 8-12
10/21/75 P.M.	p. 41 (3527) lines 14-18

4. Questions Improper as to Form

7/24/75	p. 33 (2496) lines 16-17
7/31/75 A.M.	p. 95 (2728) lines 10

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* Mr. Lavinsky objects to 7/24/75 p. 51 (2516) lines 11-15, but this has been deleted.

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9/4/75 A.M.	p. 59 (2981) lines 13-15 p. 78 (3000) lines 18-21
9/9/75 A.M	p. 3 (3085) lines 11-12
9/11/75 P.M.	p. 69 (3273) lines 17-21 p. 72 (3276) lines 6-7, 10-15 (Specified above also) p. 83 (3287) lines 8-11
10/21/75 P.M.	p. 41 (3527) lines 14-18 p. 42 (3528) lines 15-19

5. Lack of Adequate Foundation

7/31/75 P.M.	p. 10 (2740) lines 17-25 p. 11 (2741) lines 2-25 p. 12 (2742) line 2 p. 22 (2752) lines 5-14
9/4/75 A.M.	p. 59 (2981) lines 13-18 p. 63 (2985) lines 23-25 p. 64 (2986) lines 2-7, 15-25 p. 65 (2996) lines 2-15
Specified above under attorney-client privilege	(p. 70 (2992) lines 21-25 (p. 71 (2993) lines 2-25 (p. 72 (2993) lines 2-25 p. 73 (2995) lines 2-25 p. 74 (2996) lines 2-14
9/9/75 A.M.	p. 2 (3084) line 15 through p. 7 (3089) line 14
9/9/75 P.M.	p. 100 (3182) lines 10-25 p. 101 (3183) lines 2-5 p. 118 (3200) lines 10-23
9/11/75 A.M.	p. 58 (3262) line 8 through p. 61 (3265) line 8 p. 72 (3276) lines 6-9 p. 75 (3279) lines 12-15 p. 77 (3281) lines 10-17

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6. Prejudicial, Inflammatory Statements

7/24/75	p. 10 (2472) lines 18-20 p. 11 (2473) lines 11-20 p. 13 (2475) lines 2-11
9/11/75 A.M.	p. 58 (3262) lines 6-7 p. 59 (3263) line 6
9/11/75 P.M.	p. 60 (3264) line 22 p. 61 (3265) lines 4-8

7. Hearsay

9/9/75 A.M.	pp. 2-7 (3084-3089) as specified under lack of foundation
9/11/75 A.M.	p. 2 (3206) line 11 through p. 4 (3208) line 6
9/4/75 A.M.	p. 74 (2996) lines 4-8

8. Irrelevant

7/24/75	As specified under prejudicial, inflammatory statements

A. Friend's Objections

Friend's objections fall into three categories: the testimony is irrelevant; it is incomplete and must be supplemented by other testimony; and general form objections.

The last category is premised on a most novel proposition: that somehow the questioning of a criminal suspect or target, whether before the grand jury or in the prosecutor's office, is governed by the rules of evidence and is to be run like a deposition in a civil case. Such an assertion is absurd and totally without foundation. The defendant Friend, of course, cites no authority for his

position. He simply fails to realize that this is a criminal proceeding, which he cannot transform into a civil deposition. The rules of evidence have no application to grand jury questioning. Rule 1101(d)(2), Fed. R. Evid. A defendant's relevant statements, including grand jury testimony and any other kind of pre-trial statements, are admissible against him without such form objections.

The Government submits that the objections to portions of Friend's testimony on the basis of relevancy are also without merit. Only by the Court actually reading the testimony will the relevancy be evident; however, we will categorize the objected-to testimony as to its subject matter, which we submit shows that the relevancy is self-evident:

7/24/75	Page 10, lines 18-25 Page 11, lines 11-20 Page 13, lines 2-12	This deals with Friend's being hired, his salary and his corporate positions.
7/31/75 P.M	Page 10, line 12 through page 12 line 2	These passages deal with Friend's knowledge concerning the status and existence of paved roads at Rio Rancho.

9/4/75 A.M. Page 70, line 12 through
Page 78, line 22

This deals with Friend's knowledge of how long it would take for Rio Rancho to develop. It also shows Friend's knowledge that land at Rio Rancho was sold as an investment.

9/11/75 P.M. Page 60, lines 18-20

This and other portions of this page relates to Friend's knowledge of another residential development between Rio Rancho and Albuquerque.

Portions designated at pages 70 through 74. After revisions, we are offering p. 69, line 13 through through p. 72, line 16. Pages 73 and 74 are deleted.

This relates to Friend's knowledge of what Amrep paid for the original Rio Rancho land in 1960, and what it paid for the additional 37,000 acres in 1970.

9/11/75 P.M. Page 84, lines 8-13

This relates to the reason why there were no disclosures to purchasers that there was no resale market for Rio Rancho land.

10/21/75P.M. Page 39, line 19 through
page 42, line 21, except for page 41, line 8

This relates to Friend's knowledge of, and attendance at sales dinners for Rio Rancho land.

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The objections to portions of Friend's testimony on the basis of incompleteness are likewise without merit. Only by comparing what the Government has designated with what Mr. Quinlan claims should be added can it be determined whether the Government's designated portions are complete or in need of further explanation by way of including additional testimony. We submit that the Government's designated portions are complete, and we suggest that a guideline for making that determination is as follows: if the portions of Friend's testimony that Mr. Quinlan claims must be added had not been elicited, would the testimony that is being offered by the Government be understandable and not misleading. If so, then that testimony is complete. If an answer has been completed, Friend is not entitled to offer other questions and answers merely to help himself or which are favorable to him.

Finally, Mr. Quinlan states that if the additional portions of Friend's testimony which he claims should be read at the time the Government reads its designated portions are not read, Friend intends to read such additional portions during the defense case. Such an offer would be totally improper and inadmissible at any time. If the court rules that the additional portions of Friend's testimony must be read in order to make the Government's designated

portions complete, then the testimony will be read together. However, if the Court rules that the additional portions do not have to be read in order to make the Government's designated portions complete, the additional portions cannot be read by the defense at any time during the trial, because they constitute inadmissible hearsay:

> "The hearsay rule . . . is not a ground of objection when an opponent's assertions are offered against him; in such case, his assertions are termed admissions. But the hearsay rule is a ground of objection by the first party when the opponent's assertions are offered in his favor; and such statements are then not termed 'admissions.'" (Emphasis in original). Wigmore, Evidence, § 1048, p. 5.

B. Friedman-Hoffman and Corporate Objections

The Friedman-Hoffman objections and the corporate objections, categories 3-6, and 8, are totally misplaced. In the first place, Friedman-Hoffman have absolutely no standing to object to admissions of Friend offered by the Government against Friend. They have suggested neither logic nor authority for such a novel proposition. Secondly, as noted supra at 22, "form" objections have no application to a defendant's pre-trial statements.

Thirdly, the defendants totally ignore the fact that the questions themselves are not evidence, but serve only to put the testimony in context. In any event, the

passages complained of are totally mischaracterized by the defendants, and the Government suggests that a reading by the Court will quickly dispose of these points. A couple of examples, however, should suffice to demonstrate the frivolous character of defendants' objections. Mr. Arkin complains of the following Friend answer to a question as argumentative (p. 3200, line 23): "Correct. So what?" The corporations object at p. 3275, on the grounds of lack of foundation, to reading to Mr. Friend one of his own memoranda and asking him if it refreshes his recollection that Amrep paid $180 for a large land purchase for Rio Rancho. Equally ridiculous is the assertion that Friend's salary of $78,000 and his bonuses (p. 2475) are prejudicial and inflammatory and, most incredible of all, not relevant. It is hard to take such claims seriously.

Finally, defendants object to certain passages as speculative, or Friend's opinion, or without foundation. The Government fails to comprehend these objections, which of course, are offered by the defendants without supporting authority. As noted supra at 7, the Government will establish Friend's competency to make these statements, and it will be clear that Friend is just as competent as any senior officer and director to testify to these matters for the corporations.

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Of course, Mr. Arkin's clients have no standing to complain about Friend's admissions. Moreover, Friend's opinions are highly probative of his knowledge and intent. The absurdity of these objections is demonstrated by the questions and answers on pp. 2992-96, wherein Mr. Friend answers questions about his knowledge and acceptance of factual projections for Rio Rancho contained in a brief submitted on behalf of all defendants to the United States Attorney before the indictment, wherein the defendants argued that there should be no indictment.

The remaining objections such as attorney-client, work product, and hearsay are equally without merit. First, many of the passages on their face are not covered by the attorney-client privilege but are simply statements of Friend's knowledge or belief that certain statements were misleading or that facts were true (e.g., pp. 2496, 2513). Others on their face involve no disclosure of confidential communications from client to attorney (pp. 2662-63). Others involve facts contained in a brief submitted by the defendants to the United States Attorney (pp. 2992-94). To claim, let alone sustain their burden of proof, that such testimony is privileged strains credulity. At best it suggests that the attorneys preparing these objections should have spoken first with their colleagues to learn more about this case

and the matters complained of. The so-called work-product passages do not reveal affirmatively confidential matters but are merely statements that Friend did not know certain facts until just before he testified. The facts themselves are not confidential since they were part of Amrep's contracts with Rio Rancho purchasers. In any event, as discussed in detail in the Government's original brief on work-product, the information was disclosed to Friend after the defendants knew he was a target and was giving grand jury testimony. Quite obviously, the defendants have not met their burden of proving the privileged nature of such testimony.

In any event, as this Court has already ruled, Friedman-Hoffman have no standing to raise such objections (theirs are now moot). Insofar as it relates to the corporations' objections, even their legal discussion is erroneous. As the Government demonstrated in its original brief on the attorney-client questions, at p. 118, the Court will have to rule on such questions at the point when the testimony is offered, in order to determine if the Government has established by that point a prima facie case that the communications were in furtherance of the fraud. It is equally well settled that the attorney may be totally innocent as long as the communications were used by the client in furtherance of a criminal purpose.

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The defendants' principal hearsay objections are to pages 3084-3089. It is interesting to at least note that as to the other items complained of the defendants apparently cannot agree on what is hearsay or what is objectionable. The principal passage objected to involves Friend's testimony about the amount of building at Rio Rancho and the previous residence of the present homeowners or residents. Friend is being questioned about information relating to corporate matters and has obviously acquired his information from corporate files and sources. Accordingly, as a Senior Vice-President, director and general counsel, he is qualified and competent to so testify. If necessary, the Government will prove that the persons mentioned at page 3087 (lines 21-25) were providing information to Friend as corporate agents. For the record, Joan Dacey was an associate of outside counsel to Amrep, and assisting the corporation and other defendants to respond to the grand jury proceedings; "Ted" and David Waldman were in-house corporate lawyers working under Friend; and Larry Perlmutter was another Amrep vice-president. The remaining "hearsay" passages are of a similar nature (pp. 3026-3028) or on their face are not hearsay.

CONCLUSION

For all of the reasons stated above, the grand jury testimony of the defendant Friend which the Government has offered should be admitted into evidence.

Respectfully submitted,

ROBERT B. FISKE. JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

PATRICIA M. HYNES,
ALAN R. KAUFMAN,
MICHAEL S. DEVORKIN,
JOHN F. KALEY

Assistant United States Attorneys,

- Of Counsel -

A 9451

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, :

-against- :

AMREP Corporation, et al., :

Defendants. :

----------X

AFFIDAVIT

S 76 Cr. 644 (CMM)

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

STANLEY S. ARKIN, being duly sworn, says:

1. I am a member of the firm of STANLEY S. ARKIN, p.c. We represent Howard Friedman and Henry Hoffman, defendants in the above-entitled case.

2. I submit this affidavit in order that there be no misunderstanding of what I meant by the phrase "emotional instability" in the affidavit I filed with this Court on October 13, 1976.

3. In my view Solomon H. Friend is a man of complete integrity and decency, a professional of high competence, sound judgment, and an unblemished career before the Bar of this Court.

Nonetheless as with any human being, particularly a devoted family man, when a close member of his family develops a serious illness, as Mr. Friend's daughter did in 1975, and when at the same time he sees his entire professional life, and hence his ability to protect his family, threatened by the spectre of being named in a criminal case for reasons which Ms. Hynes refused

the grand jury and, in effect, pressuring him into breaking the attorney-client privilege in order to exonerate himself--a dilemma that understandably would upset any honorable attorney.

This severe distress, of which Ms. Hynes was certainly aware, was a major factor contributing to the manner of Mr. Friend's grand jury testimony.[1] His situation, cruelly played upon as it

---

[1]For example, on July 31, 1975, A.M. session, at pp. 96-98, the following colloquy occurred:

> A Look, I understand what you are saying, Miss Hynes. You might not like what the company does and maybe there are things that these people don't like, but I, as a lawyer, did not participate in any conspiracy to violate any laws.
> All I tried to do was to see that they complied with the laws. I can't impress that upon you.
> I waived my Fifth Amendment because I have nothing to hide.
> Don't you see, if I get indicted--I want you to know that my life is ruined. I have no way of making a living. I am finished. And, I have done nothing wrong.
> Q Can we deal with the facts in this case.
> A I get upset. It makes me ill.
> Q Can you continue to read in that property report?
> A I mean that. I didn't start this company. I came here as a lawyer trying to do a good job, and now I am a target.
> What am I a target about?
> Q Can you continue to read?
> A I worked my rear end off trying to get this company to do something right.
> Q Did you think they did something wrong?
> A Not while I was there and neither does Ed. It might not be nice what they did--
> Q What is not nice?
> A Some people think the land industry is a sleazy business. I don't particularly believe it is illegal.
> Ed Winslow doesn't think it is illegal. You gave Ed Winslow immunity.
> If I did anything wrong, so did he. But he didn't. Ed is as honest as the day is long.
> Q We are trying to get [illegible] formation here that may--
> A You are killing me. [illegible] are making me sick. I know you don't want to, but that's the truth. I can't help you. My whole career, my professional reputation, everything I have done in my life--
> Q You have made an adequate record, I believe. Now, can we go on?
> A I want to apologize. I can't help it. No one should be in a position that I am in.

was by Ms. Hynes, coupled with the unfair mode of questioning, to my mind are two of a number of circumstances this Court should consider in its decision to bar the testimony of Solomon H. Friend.

After Ms. Hynes was informed of the illness of Mr. Friend's daughter and despite numerous requests that she tell him what it was that she thought Mr. Friend had done wrong, all of which were refused, rather than to react with understanding, she utilized his condition to badger him, to solicit his opinion, to get him to testify that what his clients had done before he came to the Company was wrong, to get him to testify to hearsay, to cut him off before he could explain what he meant, and to violate the attorney-client privilege. She now seeks to introduce this testimony into evidence in a joint trial, despite the fact that the jury will surely consider it against Mr. Friend's co-defendants. We object to its introduction into evidence.

Stanley S. Arkin

Sworn to before me this
18th day of October, 1976

ALICE LYNN WIEKOWSKI
Notary Public, State of New York
31-4525272 – New York County
Commission Expires March 30, 1978

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	S 76 Cr. 644 (CMM)
v.	:	
AMREP CORPORATION, et al.,	:	
Defendants.	:	

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF OBJECTIONS BY DEFENDANT SOLOMON H. FRIEND TO GOVERNMENT DESIGNATION OF GRAND JURY TESTIMONY

On September 27, 1976, the government designated portions of the grand jury testimony of defendant Friend which it then proposed to offer at the trial. The material designated by the government at that time was, in large part, clearly and grossly improper. As set forth in the objections previously filed by defendant Friend, and the memorandum submitted therewith, the material originally submitted included not only questions which were argumentative or otherwise improper in form, and called for speculation and opinion, but also extensive statements, arguments, and gratuitous comments by the prosecutor. In its second designation of grand jury testimony, served on October 6, the government has now deleted a number of the passages which were most clearly improper on their face.

The revised designation, however, contains a large amount of improper material, and some objectionable material has actually been added in the government's most recent selection. The revised designation, in its entirety, is also still subject to the general objections set forth in defendant Friend's previous memorandum. For convenient reference, a revised schedule of objections, keyed to the second designation, is submitted herewith.

One addition to the government's designation is improper in form, and grossly out of context. From the testimony on September 11, 1975, the government has now designated the following question and answer, which was not included in its previous list (page 84):

> "Q The reason you're saying that the company didn't disclose to the purchasers that there was no resale market for this land, even though they were selling it for investment, was that there was not a specific regulation that required them to; is that your testimony?
>
> "A I would say that is about right."

The statement contained in the prosecutor's question, that the company "didn't disclose" the absence of a resale market, is apparently based on the fact that the absence of a resale market is not discussed in certain advertising materials. Just before the quoted testimony, however, the witness had pointed out that the absence of a resale market <u>was</u> disclosed in the property report which was given to purchasers (pages 81-82):

"Q Why wasn't there a statement like that in the promotional material and the sales film which the customer saw and was given?

"A Miss Hynes, the only answer I can give you is that the statement was not required to be made as an affirmative statement in literature because the regulations only required that it be put in the property report.

"Q Mr. Friend, there is --

"A And they were put in there."

And immediately following the excerpt designated by the government, the testimony again made clear that the absence of a resale market was disclosed in the property report (pages 84-85):

"Q Now, let me be clear on this. You are saying that you did advise the company to make this kind of disclosure in advertisements, or you did not?

"A I advised the company to be sure that no salesman --

"Q Advertisements, advertisements that come from the company, promotional material that come from the company, disclaimers in advertisements that the company --

"A I advised the advertising department who would write the ads that they could not imply in the advertising that there was a resale market.

"Q Did you advise them that there, in fact, is no resale market?

"A No, because it was not required by the regulation, but it was required to be disclosed in certain property reports, and I advised them to disclose it in the property reports, and they did disclose it in the property reports. Not everything that is in a property report is in advertising. Otherwise you would have to have an ad that is equal to the property report. This is the reason the government requires property reports."

Under these circumstances, reading the one question and answer designated by the government would be seriously misleading and prejudicial.

In other instances, the omissions from the government's revised designation would themselves be misleading, because the portions retained would be taken out of context. For example, the revised designation retains a portion of the testimony on the company's obligations with respect to improvements (7/31/75 P.M., pages 21-25), but now seeks to delete the following question and answer, in which Friend testified as to his reliance on the company's previous counsel (page 21, lines 21-25):

> "Q Mr. Friend, what I am asking you is how do you state that the company is not obligated to provide a lot with curbs and gutters and sidewalks?
>
> "A Because that is what Ed Winslow advised me was the concept, that is what he trained me on in my first six months."

This fact is clearly relevant to the issue of Mr. Friend's good faith, and if the rest of the testimony is to be used, it would be blatantly unfair to omit that portion.

The government now also seeks to omit the following testimony, which immediately follows the designated testimony on the subject of "dirt roads" (7/31/75 P.M., pages 21-26):

> "Q In the next sentence it [the booklet, "How to Live - Retire - Invest in the Sunny Southwest"] says, 'In addition, since we build engineered all weather roads property graded, compacted soil strengthened with bonding agents,

clay, caliche and rock material wherever necessary for grade durability.' [Emphasis supplied]

"Q Someone reading that is supposed to understand that is a dirt road?

"A Ms. Hynes, not only do I think it is accurate, the state thinks it is accurate, and the property report says the same thing.

Maybe we should have said, parentheses, this is not a paved road.

"Q Should it have said that, particularly since it is under a photograph of a paved sidewalk, Mr. Friend?

"A In the first place, this picture doesn't show the road at all, it just shows the house.

"Q It shows paving, doesn't it?

"A It shows a driveway, it does not show the road."

The fact that the company described the roads as "compacted soil" is obviously not helpful to the government's contention that purchasers were misled about the nature of the roads. If the testimony on this subject is to be admitted at all, the government should not be permitted to delete portions which it finds damaging to its case.

CONCLUSION

Defendant Friend again submits that the entire grand jury testimony should be excluded, for the reasons set forth in defendant's principal memorandum and objections. If any part of

the testimony is to be used, however, the government should not be permitted to make misleading and prejudicial use of quotations taken out of context.

Respectfully submitted,

ROGERS & WELLS

Attorneys for Defendant
Solomon H. Friend
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New York, New York 10017
(212) 972-7000

OF COUNSEL:

William R. Glendon
Guy C. Quinlan

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

-against- :

S 76 CR. 644 (CMM)

AMREP CORPORATION, et al., :

Defendants. :

----------x

REPLY MEMORANDUM OF DEFENDANT SOLOMON H. FRIEND IN SUPPORT OF OBJECTIONS TO GOVERNMENT DESIGNATION OF GRAND JURY TESTIMONY

The Memorandum filed by the Government, in response to defendant Friend's objections to grand jury testimony, fails to meet the substance of those objections, and defendant submits that no extensive reply is required. The following points, however, should be briefly noted.

1. The Government cavalierly dismisses all objections to argumentative and improper questions in the grand jury by the assertion that "the rules of evidence have no application to grand jury questioning", and that accordingly a grand jury transcript is admissible against a defendant "without such form objections"

(Gov. Mem. p. 23)*, citing Rule 1101(d)(2) of the Federal Rules of Evidence. However, Rule 1101(d)(2) has no bearing on the admissibility of evidence at trial, which is the issue here. The sole purpose of that Rule was to make clear that an indictment was not necessarily invalid if it was returned on the basis of hearsay or other evidence which would be incompetent at trial. In its Note on Rule 1101(d)(2), the Advisory Committee quoted from Costello v. United States, 350 U.S. 359 (1956), in which the Supreme Court rejected a challenge to an indictment on evidentiary grounds, stating (pp. 363-4):

> "Petitioner urges that this Court should exercise its power to supervise the administration of justice in federal courts and establish a rule permitting defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence. No persuasive reasons are advanced for establishing such a rule. It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change. In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but

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* Citations to "(Gov. Mem. p.)" are to the "Government's Memorandum of Law in Support of the Admissibility of Defendant Friend's Grand Jury Testimony" served on defendants on October 18, 1976.

add nothing to the assurance of a fair trial." (Emphasis supplied)

So far as we are aware, no court in the United States has ever held that the relaxation of evidentiary rules in the grand jury can be extended to the "trial on the merits". On the contrary, the courts in this Circuit have on several occasions criticized prosecutors for abuse of the Costello decision, through excessive reliance on incompetent evidence in obtaining indictments. See, e.g., United States v. Estepa, 471 F.2d 1132, 1135-6 (2d Cir. 1972); United States v. Arcuri, 282 F. Supp. 347, 348-9 (E.D.N.Y. 1968), and authorities cited therein. Now, however, the Government suggests that objectionable questions should not only be allowed in grand jury proceedings, but that they should thereby become admissible at the trial, free of any objections which would be interposed if such questions were asked at trial in the first instance. This novel suggestion is untenable. If adopted, it would place a premium upon improper prosecutorial conduct, since grand jury proceedings could be manipulated to introduce otherwise inadmissible evidence at the subsequent trial.

2. A similar comment applies to the Government's unwillingness to have its proposed quotations placed in context (Gov. Mem. pp. 25-26). As set forth extensively in defendant

Friend's principal brief, the selected fragments of testimony designated by the prosecutor have been chosen, in many instances, in such a way as to seriously distort the substance of defendant Friend's testimony. Clearly, in a civil case, the Government would not be permitted to make such selective use of fragments of a deposition, while at the same time precluding the defendant from placing the quotations in context. It is equally clear that the defendant would be permitted to have the necessary context read at the same time as the other portions of the testimony (Rule 32(a)(4), Federal Rules of Civil Procedure). As was held in the leading case in Westinghouse Electric Corp. v. Wray Equipment Corp., 286 F.2d 491, 494 (1st Cir. 1961):

> "The rule provides a method for averting, so far as possible, any misimpressions from selective use of deposition testimony. The opposing party is entitled under the rule to have the context of any statement, or any qualifications made as a part of the deponent's testimony also put into evidence. We believe that the spirit of the rule dictates that the opposing party should be able to require the introduction of the relevant parts of the deposition testimony at least at the conclusion of the reading of the deposition."

There is no merit to the suggestion that similar procedural safeguards should not be available to a defendant in a criminal case. The wide latitude allowed to the Government before a grand jury, in seeking an indictment, should not be manipulated

to permit the introduction of prejudicial, improper or misleading evidence at the trial on the merits.

3. The Government also asserts (Gov. Mem. p. 23) that testimony as to Friend's salary is relevant, although still without setting forth any reason for the assertion. If the effort is to prove pecuniary motive, Friend's salary would not be relevant in the absence of proof that it exceeded the normal compensation for a general counsel of a comparable large corporation. There is no such proof, and in fact the evidence would show that Friend's starting salary with Amrep was commensurate with what he had been earning in private practice.

Further, even if the evidence as to salary were arguably relevant, it should be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury . . ." Fed. R. Evid. 403. Accord, Eichel v. New York Central R. Co., 375 U.S. 253, 255 (1963); 1 Weinstein's Evidence, Sec. 403[01], pp. 403-7. In fact, the only apparent function of the testimony designated would be to inform the jury that Friend earns what, to a non-professional person on the jury, might seem like a high salary. Evidence which serves no apparent purpose except to create possible prejudice against a defendant should clearly be excluded.

Much of the remaining testimony designated by the

Government is also irrelevant, as set forth in our principal memorandum. Testimony is offered in support of allegations which, even if established, would not be probative of the charges in the indictment (see Gov. Mem. pp. 23-4), and would therefore present a substantial risk of misleading or confusing the jury. Under the mandate of Rule 403, such evidence should be excluded.

CONCLUSION

For the reasons set forth above, and in the papers previously submitted in support of defendant Friend's objections to the designation of grand jury testimony, the referenced testimony should be excluded in its entirety. If, however, any portion of it is admitted, the Government should be required to offer other relevant portions in order to place the designated excerpts in context.

Respectfully submitted,

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Of Counsel:

William R. Glendon
Guy C. Quinlan
James B. Weidner

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA, :

v. :

AMREP CORPORATION, et al., : S 76 Cr. 644 (CMM)

Defendants. :

- -x

MEMORANDUM

This memorandum is being submitted in accordance with the Court's direction that the corporate defendants specify any objections they may have to those portions of the grand jury testimony of Solomon H. Friend on which rulings were made before the Court held that the testimony of Mr. Friend was not admissible against the corporate defendants. Objections are asserted to the following excerpts:

7/24/75 A.M.; page 49, lines 2 through 23

7/24/75 A.M.; page 52, lines 13 through 19

The Bruton problems presented by these excerpts are identical to those which led the Court to exclude other portions of Mr. Friend's testimony relating to the existence of a resale market for lots at Rio Rancho. See, in particular, this Court's rulings on the following:

9/11/75 P.M.; page 77, lines 10 through 17

9/11/75 P.M.; page 82, lines 10 through 12.

Dated: New York, New York
October 22, 1976

Respectfully submitted,

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Of Counsel:

Larry M. Lavinsky
Lois D. Thompson

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-against- :

AMREP CORPORATION, et al., : S 76 CR. 644 (CMM)

Defendants. :

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(Gov. Mem. p. 23)*, citing Rule 1101(d)(2) of the Federal Rules of Evidence. However, Rule 1101(d)(2) has no bearing on the admissibility of evidence at trial, which is the issue here. The sole purpose of that Rule was to make clear that an indictment was not necessarily invalid if it was returned on the basis of hearsay or other evidence which would be incompetent at trial. In its Note on Rule 1101(d)(2), the Advisory Committee quoted from Costello v. United States, 350 U.S. 359 (1956), in which the Supreme Court rejected a challenge to an indictment on evidentiary grounds, stating (pp. 363-4):

> "Petitioner urges that this Court should exercise its power to supervise the administration of justice in federal courts and establish a rule permitting defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence. No persuasive reasons are advanced for establishing such a rule. It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change. In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but

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* Citations to "(Gov. Mem. p.)" are to the "Government's Memorandum of Law in Support of the Admissibility of Defendant Friend's Grand Jury Testimony" served on defendants on October 18, 1976.

add nothing to the assurance of a fair trial." (Emphasis supplied)

So far as we are aware, no court in the United States has ever held that the relaxation of evidentiary rules in the grand jury can be extended to the "trial on the merits". On the contrary, the courts in this Circuit have on several occasions criticized prosecutors for abuse of the Costello decision, through excessive reliance on incompetent evidence in obtaining indictments. See, e.g., United States v. Estepa, 471 F.2d 1132, 1135-6 (2d Cir. 1972); United States v. Arcuri, 282 F. Supp. 347, 348-9 (E.D.N.Y. 1968), and authorities cited therein. Now, however, the Government suggests that objectionable questions should not only be allowed in grand jury proceedings, but that they should thereby become admissible at the trial, free of any objections which would be interposed if such questions were asked at trial in the first instance. This novel suggestion is untenable. If adopted, it would place a premium upon improper prosecutorial conduct, since grand jury proceedings could be manipulated to introduce otherwise inadmissible evidence at the subsequent trial.

2. A similar comment applies to the Government's unwillingness to have its proposed quotations placed in context (Gov. Mem. pp. 25-26). As set forth extensively in defendant

Friend's principal brief, the selected fragments of testimony designated by the prosecutor have been chosen, in many instances, in such a way as to seriously distort the substance of defendant Friend's testimony. Clearly, in a civil case, the Government would not be permitted to make such selective use of fragments of a deposition, while at the same time precluding the defendant from placing the quotations in context. It is equally clear that the defendant would be permitted to have the necessary context read at the same time as the other portions of the testimony (Rule 32(a)(4), Federal Rules of Civil Procedure). As was held in the leading case in Westinghouse Electric Corp. v. Wray Equipment Corp., 286 F.2d 491, 494 (1st Cir. 1961):

> "The rule provides a method for averting, so far as possible, any misimpressions from selective use of deposition testimony. The opposing party is entitled under the rule to have the context of any statement, or any qualifications made as a part of the deponent's testimony also put into evidence. We believe that the spirit of the rule dictates that the opposing party should be able to require the introduction of the relevant parts of the deposition testimony at least at the conclusion of the reading of the deposition."

There is no merit to the suggestion that similar procedural safeguards should not be available to a defendant in a criminal case. The wide latitude allowed to the Government before a grand jury, in seeking an indictment, should not be manipulated

to permit the introduction of prejudicial, improper or misleading evidence at the trial on the merits.

3. The Government also asserts (Gov. Mem. p. 23) that testimony as to Friend's salary is relevant, although still without setting forth any reason for the assertion. If the effort is to prove pecuniary motive, Friend's salary would not be relevant in the absence of proof that it exceeded the normal compensation for a general counsel of a comparable large corporation. There is no such proof, and in fact the evidence would show that Friend's starting salary with Amrep was commensurate with what he had been earning in private practice.

Further, even if the evidence as to salary were arguably relevant, it should be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury . . ." Fed. R. Evid. 403. Accord, Eichel v. New York Central R. Co., 375 U.S. 253, 255 (1963); 1 Weinstein's Evidence, Sec. 403[01], pp. 403-7. In fact, the only apparent function of the testimony designated would be to inform the jury that Friend earns what, to a non-professional person on the jury, might seem like a high salary. Evidence which serves no apparent purpose except to create possible prejudice against a defendant should clearly be excluded.

Much of the remaining testimony designated by the

Government is also irrelevant, as set forth in our principal memorandum. Testimony is offered in support of allegations which, even if established, would not be probative of the charges in the indictment (see Gov. Mem. pp. 23-4), and would therefore present a substantial risk of misleading or confusing the jury. Under the mandate of Rule 403, such evidence should be excluded.

CONCLUSION

For the reasons set forth above, and in the papers previously submitted in support of defendant Friend's objections to the designation of grand jury testimony, the referenced testimony should be excluded in its entirety. If, however, any portion of it is admitted, the Government should be required to offer other relevant portions in order to place the designated excerpts in context.

Respectfully submitted,

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Of Counsel:

William P. Glendon
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James B. Weidner

A 9474

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA, :

-against- :

AMREP CORPORATION, et al., :

Defendants. :

- - - - - - - - - - - - - - - - - - x

S 76 CR. 644 (CMM)

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JAMES B. WEIDNER, being duly sworn, deposes and says:

I am a member of the firm of Rogers & Wells, attorneys for defendant Solomon H. Friend. On the 21st day of October, 1976, I personally served copies of the annexed Reply Memorandum on attorneys for all parties herein, by giving the same to said attorneys in open court.

James B. Weidner

Sworn to before me this
22nd day of October, 1976.

Guy C. Quinlan
Notary Public

GUY C. QUINLAN
NOTARY PUBLIC, State of New York
No. 31-3193686
Qualified in New York County
Commission Expires March 30, 1977

A 9475

UNITED STATES COURT OF APPEALS

For the Second Circuit

CALENDAR No. 529 - September Term, 1976.

(Argued October 29, 1976 Decided November 1, 1976).

Docket No. 76-1478

UNITED STATES OF AMERICA,

Appellant,

v.

AMREP CORPORATION,
RIO RANCHO ESTATES, INC.,
ATC REALTY CORPORATION,
HOWARD W. FRIEDMAN,
CHESTER CARITY,
IRVING W. BLUM,
HENRY L. HOFFMAN,
HERMAN B. OBERMAN,
SOLOMON H. FRIEND, and
DANIEL FRIEDMAN,

Defendants-Appellees.

Before:

LUMBARD, VAN GRAAFEILAND, Circuit Judges,

and BONSAL, District Judge*

Appeal pursuant to 18 U.S.C. §3731 from orders of the District Court for the Southern District of New York, Metzner, J., dismissing certain counts of the indictment and excluding certain items of evidence.

Reversed

ROBERT B. FISKE, JR., United States Attorney for the Southern District of New York, for appellant.

Stanley S. Arkin, Esq., New York, N.Y. and Peter Fleming, Esq., New York, N.Y. for appellees.

*Sitting by designation.

PER CURIAM:

This appeal is taken pursuant to 18 U.S.C. §3731, which permits pretrial appeals by the Government:

1. From a decision or order of a district court dismissing an indictment as to any one or more counts;
2. From a decision or order of a district court suppressing or excluding evidence.

Section 3731 provides that its provisions shall be liberally construed to effectuate its purposes.[1/] See United States v Flores, 538 F.2d 939 (2d Cir. 1976).

The matter came before this court on October 29, 1976 on the expedited hearing of a motion to stay the trial scheduled to commence on November 3, 1976, until the expedited hearing of the appeal on the merits. During oral argument, the parties agreed that the issues should be presently determined on the merits in order that the trial might proceed as scheduled.

The original indictment herein charged the defendants in 70 counts with violation of the mail fraud statute, 18 U.S.C. § 1341, and in 10 counts with violations of the fraud provisions of the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1703 (a). The District Judge concluded that this indictment contained many unnecessary factual allegations and ordered that they be deleted.

Accordingly, on July 13, 1976, a superseding indictment was filed substantially eliminating much of the evidentiary detail. However, the substance of the 80 counts was realleged. The District Court felt that the trial would be unduly prolonged if the prosecution called the 70 allegedly defrauded witnesses required to prove the 70 counts of mail

fraud and directed the prosecutor to select 20 of them for production at the trial. Over objection, the Government designated the names of 20 allegedly victimized purchasers, and the court then dismissed the remaining 50 counts of mail fraud.

While we are most sympathetic with the desire of the District Judge to reduce the pending trial to manageable proportions, we think that the procedure which he followed was improper. The Government has indicated its willingness to limit its proof to 20 counts but argues strongly that it should not be required to make the choice of counts in advance of trial. Should witnesses prove unavailable, incompetent or inadequate as to any of these pre-selected counts, the charges against particular defendants and various facets of the case could be undermined by the resulting lack of proof.

We think the District Court should have refrained from dismissing 50 counts until the prosecution had put in its case on 20 counts for which proof was available.[2/]

The District Court has also ruled that it would not receive any evidence as to the following evidentiary matters alleged in paragraph 18(g) in the original indictment but deleted from the superseding indictment:

> (ii) the defendants and co-schemers would and did plan and devise their sales campaigns and dinner presentations in order to exploit any lack of financial sophistication and knowledge on the part of the persons to be defrauded concerning the making

of reasonably secure financial investments;

(vi) the defendants and co-schemers would and did cause their salesmen to distribute "Confidential Surveys" at the beginning of the sales dinners which were designed to elicit information from the persons to be defrauded as to the maximum amount of money they could "invest" and which were further intended and designed to encourage the persons to be defrauded to remove moneys already invested in mutual funds, stocks, insurance and savings and to reinvest these funds in the purchase of lots at Rio Rancho Estates in order to provide the persons to be defrauded with financial security for their retirement, and for other purposes;

(xi) the defendants and co-schemers would and did cause their salesmen to create a false impression of general agreement among everyone attending the dinner as to the immediate desirability of purchasing lots at Rio Rancho Estates by training the salesmen to jump up and loudly and conspicuously to call "holds" on particular lots in order to falsely suggest that many sales were being made;

(xxiii) the defendant and co-schemers would and did cause their salesmen to prevent potential customers from removing any purchase contracts, reports, or promotional material from the room where the sales dinner was held unless a sale had already been made to the purchaser;

(xxix) the defendants and co-schemers would and did design

and devise and cause letters and promotional material to be sent to the persons to be defrauded who purchased lots in order to induce them to continue to make payments on their lots and to purchase additional lots and to lull them into a false sense of security by advising them, among other things, that their "investment" was rapidly increasing in value;

We think this was error.

The gravamen of the charges against the defendants was the existence of a scheme to defraud. The use of the mails in connection with this scheme brings it within the purview of 18 U.S.C. §1341 and 15 U.S.C. §1703(a) and gives the federal courts jurisdiction over the alleged offenses. Bogy v. United States, 96 F. 2d 734,740, (6th Cir.) cert. denied, 305 U.S. 608 (1938); Periera v. United States, 347 U.S. 1, 8 (1954). Any proof, properly connected to the defendants, which establishes the manner in which the fraudulent scheme was carried into execution and the intent of the parties in relation thereto is properly admissable. This would generally include promotional literature and correspondence, the sales pitch, the contracts entered into, the failure of performance, the making of complaints and the sending of so called "lulling" letters. United States v. Cohen, 516 F. 2d 1358, 1366, (8th Cir. 1975); Beck v. United States, 305 F. 2d 595, 600-602, (10th Cir.), cert. denied, 371 U.S. 890 (1962); Reistroffer v. United States, 258 F. 2d 379, 388, (8th Cir. 1958), cert. denied, 358 U.S. 927 (1959). United States v. Regent Office Supply Co., 421 F. 2d 1174, (2d Cir. 1969), relied

upon by appellees, does not hold to the contrary.

We think that the so called "confidential survey," the lulling letter marked Ex 146j. and the sales pitch practices involving "holds" and retention of papers fall clearly within the above categories. We hold that proof falling generally within the areas we have outlined above is admissible for the purpose of establishing that the defendants devised or intended to devise a scheme or artifice to defraud or to obtain money by falee or fraudulent pretenses or representations, in violation of 18 U.S.C. §1341 and 15 U.S.C. §1703, or engaged in any transaction, practice or course of business which operated as a fraud or deceit upon purchasers, as proscribed by the latter section. Relevant evidence should be admitted and not excluded. It makes no difference whether such evidence is particularized in the indictment; the fact that it is no longer detailed in the superseding indictment on which the defendants are to be tried does not render it inadmissible. We therefore reverse the order of the District Court which generally excludes testimony as outlined in the several above quoted paragraphs of the original indictment.

The government also asks us to rule on the admissibility of portions of the grand jury testimony of the defendant Friend[3] which have been excluded by the District Judge on the ground that they are inadmissible under Bruton v. United States, 391 U.S. 123 (1968). After reviewing the testimony in question, we see no reason for its exclusion. The evidence is not so clearly inculpatory as to any of the co-defendants that it cannot be admitted against Friend subject to a cautionary instruction that adequately protects these other defendants. United States v. Wingate, 520 F.2d 309, 311 (2d Cir. 1975). On the other hand the evidence would seem

to be substantial proof of material facts as to the charges against Friend since it indicates his awareness of the absence of a resale market for the properties involved.

Accordingly, the orders of the district court, complained of by the United States Attorney, are reversed.

1/ Under 18 U.S.C. § 3731 the government must certify to the trial court that the evidence excluded is substantial proof of facts material to the charges and that appeal is not for purposes of delay. At a conference on October 22, the government informed Judge Metzner of its intention to appeal some of his evidentiary rulings due to the importance of the matters being excluded. This notification to the trial judge and defense counsel, recorded in the minutes of the conference, fulfilled all the requirements of timely certification under § 3731.

2/ While it is not clear whether the district court's rulings were intended to exclude all testimony from all victims other than the twenty selected by the United States Attorney, we see no reason to exclude the testimony of any such victims which relates to the manner in which the alleged scheme to defraud was conducted.

3/ The items, all of which were the subject of exclusionary rulings by the district court at the pre-trial hearings, appear in Friend's grand jury testimony of July 24, and September 4, 9 and 11, 1975 at the pages indicated in the folder filed with this court upon the argument of the appeal.

BONSAL, District Judge (dissenting):

I respectfully dissent.

As stated in the majority opinion, the original indictment, on which the defendants were arraigned on November 10 1975, charged them with 70 counts of mail fraud (18 U.S.C. §1341) and 10 counts of violations of the Interstate Land Sales Full Disclosure Act (15 U.S.C. §1703(a)). The original indictment, concededly confusing and prolix, was 42 pages long and contained 110 specifications in 29 different categories of alleged misrepresentations and fraudulent selling practices.

Following pretrial conferences in May, June and July 1976, the District Judge was of the opinion that the indictment contained many unnecessary allegations. In an effort to reduce the trial to manageable proportions by limiting the proof to be presented to the jury, the District Judge suggested that a number of factual allegations be deleted from the indictment.

On July 13, 1976, the Government obtained a superseding indictment of 26 pages which eliminated much of the evidentiary detail. At a pretrial conference held on the same day, the Government maintained that the superseding indictment did not eliminate any of the proof that would have been offered under the original indictment. After reviewing the superseding indictment, the District Judge was of the opinion that "... all of the matter alleged under the original indictment appears in the superseding indictment except five specifications." United States v. Amrep Corp., et al., S 76 Cr. 644 (Opinion of Judge Metzner dated October 27, 1976 at page 3). Since the Government was unable to indicate any allegation in the superseding indictment which would support these specifications, the District Court ruled that it would "... not take any proof on the following paragraphs which appear in the original indictment and which the government still maintains it will use on the trial of the superseding indictment." Id.

While the Government argues that the excluded evidentiary items will be relevant to the proof of a scheme to defraud, such a decision lies within the sound discretion of the trial judge and should not be disturbed on appeal absent a clear showing that "... the evidence is a substantial proof of a fact material in the proceeding." 18 U.S.C. §3731.

Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." Fed. Rules Evid. Rule 403. Here, the District Judge stated:

> "In this court's opinion, with its detailed knowledge of the case, the government will not be hampered or prejudiced in its presentation of the case. However, these rulings will aid in narrowing the issues, the scope of proof and the comprehensibility for the court and jury."
> United States v. Amrep Corp., supra at 4.

In the balancing of factors required by Rule 403, the trial judge has wide discretion and the ruling that he makes should not be disturbed unless the discretion has been clearly abused. United States v. Dwyer, ___ F.2d ___, Dkt. No. 76-1108 (July 26, 1976); United States v. Cowsen,

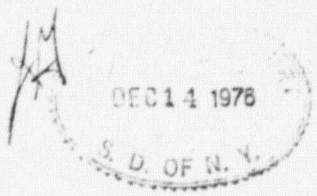
530 F.2d 734 (7th Cir.), cert. denied, 44 U.S.L.W. 3685 (1976); United States v. Wixom, 529 F.2d 217 (8th Cir. 1976).

I would not interfere with the District Judge's determination excluding certain portions of Friend's Grand Jury testimony under the doctrine of Bruton v. United States, 391 U.S. 123 (1968). It is not apparent to me why the excluded portions are sufficiently vital to the Government to warrant review. Moreover, if received, the jury would have to be instructed that the evidence could only be considered with respect to Friend and not with respect to the other defendants, injecting an element of possible confusion.

Here, the District Judge has conducted numerous pretrial conferences in an effort to reduce a complex indictment to a manageable size for trial. The District Judge is intimately familiar with the facts of the case, and there is no evidence that he has abused his discretion in these pretrial rulings, nor in his ruling that the Government select 20 mail fraud counts which would be tried.

Accordingly, I would deny a review of the District Court's orders.

A 9487



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
-against-	:	S 76 CR. 644 (CMM)
AMREP CORPORATION, et al.,	:	
Defendants.	:	

Objections of Defendant Friend to Grand Jury Excerpts Designated by the Government on 12/11/76 for Offer Into Evidence

The following constitutes our objections on behalf of Mr. Friend to the excerpts of his Grand Jury testimony which the Government will seek to read into evidence, as indicated by the handwritten designation submitted by the Government on Saturday afternoon, December 11, 1976.

As will appear, a number of these excerpts have already been excluded by this Court's rulings at the pretrial conference held on October 21, 1976. While the Government subsequently appealed some of the October 21 rulings which had been based in part on Bruton grounds, this Court had based a number of the rulings upon grounds wholly unrelated to Bruton or upon grounds in addition thereto. Accordingly, those non-Bruton rulings were not affected in any way by the subsequent decision of the Second Circuit.

Additional portions of the testimony which the Government now seeks to read would, as will appear, be inadmissible because of other rulings made by the Court during the pretrial conferences or upon grounds which were not then raised, because

this Court's Bruton rulings mooted the need for further objections. Still other portions are excludable in light of rulings and circumstances which have arisen in the course of trial.

For convenience, we will follow the same descriptions sequence as given by the Government in its handwritten designation of excerpts.

Date, Page and Lines of Grand Jury Testimony	Grounds for Exclusion
7/24/75	
p. 10, line 18, thru p. 11, line 20 p. 13, lines 2-13	This testimony relates only to questions of salary, which this Court has already excluded as immaterial (Pretrial Conf. 10/26/76, p. 362).
p. 14, lines 6-21	Immaterial, since this testimony does not connect Mr. Friend with any particular pieces of advertising.
p. 19, lines 11-20, 25, as redacted p. 20, lines 2-6 and 8-10	This testimony relates to an exhibit which is now part of GX 341 for Id., which has previously been submitted to the Court by Mr. Lavinsky for a ruling as to privilege. We have previously filed a Memorandum, dated November 26, 1976, objecting to the admission of this document, to which we respectfully refer the Court. (The document bears handwritten notations of Mr. Friend and was briefly mentioned in a robing room conference on November 29, 1976, wherein the Court noted

the difficulty of understanding these markings. See Tr. p. 2703.) If the document is excluded, then this testimony should also be excluded.

p. 32, line 14, thru p. 33, line 15

This testimony relates to changes made in the pamphlet "This Is My Land". It is therefore directly contrary to the theory of the Government's case that the promotional materials used by AMREP remained unchanged. Further, comparison of the two versions of this pamphlet (GX 388 and GX 389), before and after the changes mentioned by Mr. Friend, shows that any fair reading thereof proves this evidence to be exculpatory, not inculpatory, of Mr. Friend. Thus it is irrelevant on the Government's case in chief. (See analysis in our Memorandum of November 26, 1976, described above.) Also, we note that the Government had previously stated it would redact part of line 12 and line 13 on page 33, which redaction is not indicated in the present designation.

p. 48, line 19 thru p. 49, line 23

This testimony concerns the possibility of resale and Friend's instructions concerning the content of scripts in that regard. The testimony as to resale is cumulative to various documents and testimony already in

	the record (e.g., GX 732, p. 3, ¶ 5; GX 409A, p. 9, ¶3). Also, this testimony is exculpatory, not inculpatory, of Mr. Friend and therefore is irrelevant to the Government's case in chief.
p. 52, lines 13-19	This testimony, again, relates to resale and, for the same reasons stated above, is also cumulative.

7/31/75 A.M.

p. 29, line 19 thru p. 30, line 5	The testimony is out of context and thus does not show that Friend was speaking about a particular registration in 1975; it is exculpatory, not inculpatory, of Friend; and it is cumulative as to the exchange privilege.

7/31/75 P.M.

p. 10, line 21, thru p. 12, line 2	This testimony relates to the distances between various Units at Rio Rancho and the extent of paved roads there. The testimony in part comprises merely estimates and is cumulative to other testimony already in the record. Further, the facts may be proved simply by reference to maps, without the need for this testimony.

9/4/75 A.M.

p. 63, line 23, thru p. 64, line 7	This testimony as to rate of development at Rio Rancho shows, on its face, that it is
p. 64, line 15, thru p. 65, line 25 (line 16 out)	simply speculation and guesswork.* Further, several of the questions are objectionable as

* E.g., p. 65, lines 11-13: "I really cannot tell you because I'd be speculating and guessing and I'd be playing the role of a clairboyant [sic] and I'm not."

to form and several answers are unresponsive to the questions asked.

p. 70, line 12, thru p. 71, line 10 (delete three words in line 4, i.e., "in the brief")

p. 71, line 20, thru p. 72, line 19 (delete line 12)

p. 73, lines 9-18

This material has already been excluded by this Court at the pretrial conference on 10/21/76 as being argumentative, in addition to Bruton (Tr. on 10/21/76, p. 94). As noted at that time, this testimony is simply an extrapolation from a brief filed on behalf of the defendants with the United States Attorney before the indictment was returned. Although this Court specifically rejected Mr. Devorkin's suggestion at that time (Tr. 93-94) that the words "in the brief" merely be redacted, the Government in its designation, has, nevertheless, again suggested this tack. Not only has this suggestion already been rejected, but the proposed redaction is illustrative generally of how misleading Mr. Friend's testimony would be if the Government's proposed scalpel treatment were permitted.*

9/9/75 A.M.

p. 2, line 15, thru p. 4, line 12

This testimony, which merely recites figures from a list compiled relating to number of houses constructed, is neither the best

* Thus the Government suggests that the bracketed words in the following quotation be redacted: "A. Based on what you've shown me, I'd like to revise my estimate because I remember this [in the brief], Ms. Hynes" (9/4/75, p. 71, lines 3-4). The redaction, of course, would leave the reader with the misleading impression that Mr. Friend actually had personal knowledge of the subject matter of his testimony, when, in fact, he was merely saying that he remembered reading certain data contained in the brief.

evidence of the proof, nor probative as to Friend's actual knowledge.

9/9/75 P.M.

p. 100, lines 8-20 (Line 20 redacted to read: "50,000 families shows a conservative figure")

The answer, after the first sentence ("I don't know."), is speculative and mere guesswork, based upon the figures contained in the brief which was submitted to the United States Attorney.*

p. 118, lines 13-23 (with the first two words on line 13 redacted)

This Court has already excluded this excerpt on the grounds of vagueness, in addition to Bruton. (See Pretrial Conf. Tr. on 10/21/76, pp. 95-96.) Clearly, the answers amount to no more than guesswork.

9/11/75 P.M.

p. 57, line 25, thru p. 60, line 13

This testimony has already been excluded by this Court as irrelevant (see Pretrial Conf. Tr. on 10/21/76, p. 98).

p. 69, line 13, to p. 70, line 3

This testimony relates to a memorandum dated Jan. 27, 1971 written by Mr. Friend concerning his closing of title as to the acquisition of additional property on Jan. 25, 1971. This Court has ruled that such evidence may be admissible as against Mr. Friend only if

* Again, the Government seeks to redact the reference to "the brief" which, again, would give the misleading impression that Mr. Friend had actual knowledge of the facts when, to the contrary, his knowledge was merely derivative from the brief.

the Government first lays a proper foundation, i.e., that this acquisition occurred at the same time as customers were being told that Rio Rancho was nearly sold out (Pretrial Conf. 11/4/76, Tr. pp. 56-58*). While there has been some testimony that representations were made at one point that Rio Rancho was almost sold out, the testimony also shows that those representations were stopped in 1969 when the additional land purchases commenced, nearly two years before the date of the instant memorandum. (E.g., testimony of Lederman, Tr. 1827-32.) Further, the testimony as to the purchase price of the additional land is cumulative to evidence already in the record.

p. 75, lines 12-15 — This testimony merely comprises an estimate; is cumulative to other evidence already in the record; and is easily subject to more probative evidence.

p. 77, lines 10-17 — The question is hypothetical in form, and the answer is, again, cumulative to the evidence in the record concerning resale. (See references above.)

* While this Court at that point in the transcript was discussing GX 575 for Id., the same rationale, of course, would apply to the Jan. 27, 1971 memo referred to above (now marked as GX 732 for Id.), which also concerns a land acquisition.

p. 82, lines 10-12; p. 83, lines 6-12; p. 84, lines 8-13	These excerpts of testimony have already been excluded by this Court as being misleading (Pretrial Conf. Tr. 10/21/76, pp. 109-110).

10/21/75, P.M.

p. 58, line 20, thru p. 60, line 21 (with redaction at p. 59, line 19, of "This is important ...")	This testimony, which relates to the provisions in commercial and multiple dwelling contracts, is immaterial because it does not show any probative knowledge by Friend until 1975, and the provisions contained in those contracts can be proved from the contracts themselves, a number of which are already in evidence.

Accordingly, we request that the above designated portions of Mr. Friend's Grand Jury testimony be excluded.

Dated December 14, 1976

Respectfully submitted,

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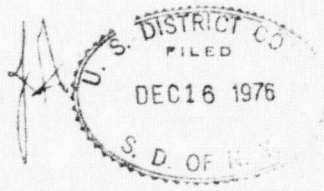
A 9495



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, :

-against- :

AMREP CORPORATION, et al., :

Defendants. :

S76 Cr. 644 (CMM)

DEFENDANT AMREP CORPORATION'S OBJECTIONS TO THE PROFFERED GRAND JURY TESTIMONY OF SOLOMON H. FRIEND

Following are defendant Amrep Corporation's objections to portions of the Grand Jury testimony that the Government has indicated it wishes to read at trial. The objections are divided into two groups: (1) Miscellaneous objections that do not involve any claim that the statements inculpate a corporate defendant; and (2) Objections based on the fact that the proffered testimony inculpates one or more of the corporate defendants. The first category includes reference to "non-Bruton" objections that were sustained by this Court at pretrial conferences held on October 21, and October 26, 1976:

Miscellaneous Objections

July 24, 1975

P. 10, lines 18-20; p. 11, lines 11-20; p. 13, lines 2-11:

All of this testimony relates to Friend's salary and bonuses. At the pretrial conference held on October 26, 1976, the Court stated: ". . . the corporate salary of the defendants, I think that's immaterial. . ." In addition,

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on October 21, 1976, the Court specifically ruled that page 11, lines 11-20 (beginning with the question, "Did you receive a salary increase . . .") and page 13, lines 2-13 could not be read to the jury (Transcript, p. 49).

P. 33, lines 2-15:

On October 21, 1976, the Court ruled that the Government would have to redact lines 12 and 13 if it sought to read this testimony (Transcript, p. 50). It has failed to do so.

P. 49, lines 2-23:

This testimony relates to legal advice that Friend gave and it therefore is privileged.

July 31, 1975 A.M.

P. 30, lines 2-5:

This is a statement of Friend's opinion and is therefore inadmissible.

July 31, 1975 P.M.

P. 10, line 21 to p. 12, line 2:

This testimony, relating to distances and the extent of paved roads, is cumulative of the testimony of a number of witnesses, including Lawrence Perlmutter, and of certain documents already in evidence, specifically, various Offering Statements and Property Reports. In addition, it involves speculation by the witness (e.g., page 11, line 11 - "That is a guess, I would say two miles.")

September 4, 1975 A.M.

P. 63, line 23 to p. 64, line 7; p. 64, line 15 to p. 65, line 25:

This testimony also involves speculation by the

witness (e.g., page 65, lines 11-13 - "I really cannot tell you because I'd be speculating and guessing. . .") On October 21, 1976, the Court noted that this testimony asks for Friend's personal belief and stated that if it was read, there would have to be a cautionary instruction to the jury (Transcript, p. 90).

P. 70, line 12 to p. 71, line 10; p. 71, line 20 to p. 72, line 19; p. 73, lines 9-18:

On October 21, 1976, this Court sustained defendant's objections to all of the testimony from pages 70 to 78 because it was argumentative (Transcript, p. 94).

September 9, 1975

P. 100, lines 8-20:

This testimony again calls for speculation by Friend. In addition, the Government proposes to eliminate reference in the testimony to the brief that was filed on behalf of all defendants before the indictment came down with a redaction that this Court explicitly rejected on October 21, 1976 (Transcript, p. 95). This Court apparently concluded that the proposed redaction would not make the remaining testimony admissible.

P. 118, lines 13-23:

The one question asked on this page is premised on an assumption that is itself based on speculation by Mr. Friend (see p. 100 of testimony of September 9, 1975, above). Moreover, this Court already has excluded the testimony because it is too vague (October 21, 1976, transcript, p. 96). On October 21, 1976, the Court also stated that the testimony was prejudicial to the other defendants. By this we believe the Court meant not that

there was a problem under Bruton, but, rather, that whatever probative value it had was "substantially outweighed by the danger of unfair prejudice. . ." (Rule 403, Federal Rules of Evidence).

September 11, 1975 P.M.

P. 57, line 25 to p. 60, line 13:

On October 21, 1976, the Court ruled that this testimony was irrelevant (Transcript, p. 98). We note that now it also is cumulative of the testimony of a number of witnesses including Albert Pierce and George Carruthers.

P. 71, line 22 to p. 72, line 9:

This material is cumulative since the price at which the land comprising Rio Rancho was purchased already is in the record.

P. 75, lines 12-15:

This material is cumulative of evidence already in the record and of the computation made by Charles Woodward. In addition, it is not the best evidence because it involves an estimate by Mr. Friend.

P. 82, lines 10-12; p. 83, lines 6-12; p. 84, lines 8-13:

On October 21, 1976, this Court ruled that these excerpts could not be read to the jury because they were misleading (Transcript, p. 110).

October 21, 1975

P. 58, line 20 to p. 60, line 21:

This testimony concerns contracts that are in evidence. Those documents speak for themselves. In addition, on October 21, 1976, this Court ruled that if the

testimony were read, a cautionary instruction would have to be given to the jury (Transcript, p. 112).

Testimony Inculpating the Corporations

The pretrial ruling of the Court of Appeals has left a serious Bruton issue unresolved. Its opinion says that the testimony of Mr. Friend "is not so clearly inculpatory as to any of the co-defendants that it cannot be admitted against Friend subject to a cautionary instruction." Slip opin. at 385. However, by letter dated October 29, 1976, to the Court of Appeals, Assistant United States Attorney Alan R. Kaufman claimed that the "statements which we hope to use are statements which inculpate both Mr. Friend and the corporation." A copy of that letter is attached to these papers as Exhibit A. The Court of Appeals never specifically addressed the question of whether these statements were admissible against the corporation, and Securities and Exchange Commission v. Geon, 531 F.2d 39 (2d Cir. 1976), on which this Court relied in its pretrial rulings, was not even mentioned in the Second Circuit opinion.

We can only conclude that since it was not fully familiar with all the facts in the case, the Court of Appeals did not focus on the conflict that existed between Friend and his corporate employer when he testified before the Grand Jury and did not understand the way in which the statements at issue inculpated the corporation. The Government, however, has taken the clear position that the statements do inculpate the corporation. (Not only did Mr. Kaufman assert that fact in his letter to the Court of Appeals; at the pretrial conference held on October 21,

1976, Assistant United States Attorney Michael S. Devorkin specifically stated that the Government offered the portions of the Friend testimony of July 24, 1975 appearing at pages 49 and 52 against Mr. Friend and the corporation (Transcript, p. 53)).

The following passages of the Grand Jury testimony of Mr. Friend therefore should be excluded:

July 24, 1975	-	p. 49, lines 2-23 p. 52, lines 13-19
September 4, 1975	-	p. 70, line 12 to p. 71, line 10; p. 71, line 20 to p. 72, line 19 p. 73, lines 9-18
September 9, 1975	-	p. 100, lines 8-20 p. 118, lines 13-23
September 11, 1975	-	p. 77, lines 10-17 p. 82, lines 10-12 p. 83, lines 6-12 p. 84, lines 8-13

Finally, Amrep objects to the reading of any portion of Mr. Frierd's testimony at this time because the evidence adduced to date by the Government has failed to connect Mr. Friend with any alleged scheme to defraud. It is anticipated that defendant Friend will move for a judgment of acquittal at the end of the Government's case. If the testimony is read now and that motion is made and granted, the testimony will unfairly prejudice the other defendants. We therefore suggest that reading from the testimony take place only in the event a motion on Mr. Friend's behalf is denied. The Government will not be prejudiced by this approach since the Court is familiar with the testimony and could consider it in ruling on the motion. In this way, the jury will not be improperly prejudiced by testimony

that will have no bearing on the case if Mr. Friend no longer is a defendant.

Dated: New York, New York
December 15, 1976

Respectfully submitted,

PROSKAUER ROSE GOETZ & MENDELSOHN
Attorneys for Defendant Amrep
Corporation
300 Park Avenue
New York, New York 10022

A 9502

EXHIBIT A

AND REFER TO
INITIALS AND NUMBER
ARK:mdk

SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

A 9503

October 29, 1976

Honorable Ellsworth A. Van Graafeiland
Honorable J. Edward Lumbard
Honorable Dudley B. Bonsal
United States Courthouse
Foley Square
New York, New York 10007

Re: United States v. Amrep Corp., et al.
Docket No. 76-1478

Honorable Sirs:

In Mr. Fiske's absence, I am writing in response to Mr. Lavinsky's letter referring to the case of Securities and Exchange Commission v. Geon Industries, Inc., et al., 531 F.2d 39 (2d Cir. 1976). We believe that case is totally distinguishable from this situation on two grounds:

(1) At the time Mr. Friend testified before the Grand Jury he, unlike Mr. Rauch, had not been suspended by Amrep but was still its general counsel -- as he continues to be today.

(2) The portions of the Grand Jury testimony which are the subject of the appeal do not involve any situations in which Mr. Friend takes a differing litigation posture from that of the corporation. The statements which we hope to use are statements which inculpate both Mr. Friend and the corporation.

Respectfully yours,

ROBERT B. FISKE, JR.
United States Attorney

By Alan R Kaufman
Alan R. Kaufman
Assistant United States Attorney

cc: All defense counsel

AK:bmj
12-722

A 9504

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA :

- v - : RESPONSE TO AMREP'S OBJECTIONS TO FRIEND'S GRAND JURY TESTIMONY

AMREP CORPORATION, et al., :

Defendants. :

S 76 Cr. 644 (CMM)

- x

The following is the government's response to Amrep's arguments concerning Securities and Exchange Commission v. Geon, 531 F.2d 39 (2d Cir. 1976), and an alleged unresolved Bruton issue involving the corporate defendant.*

Amrep claims that the Court of Appeals decision leaves unresolved an issue concerning the admissibility of Friend's grand jury testimony as against Amrep. This is correct. However, this only deals with the limited issue of whether Friend's grand jury testimony is also admissible against Amrep, not whether the testimony is admissible against Friend. Should this Court rule that Friend's testimony is not admissible against Amrep, the Court of Appeals decision still makes clear that Bruton poses no problems of admissibility of the testimony as against Friend at a joint trial with Amrep.

* With respect to Amrep's "Miscellaneous Objections," we rely on our papers dated December 15, 1976, submitted in response to the defendant Friend's objections.

AK:bmj
12-722

At oral argument in the Court of Appeals, there was a discussion of whether Friend's grand jury testimony could be admissible against the corporation. This is not a Bruton issue, but rather a question of whether a corporate officer is the corporation for purposes of making an admission. See Fed. R. Evid. 801. The government cited to the Court United States v. Kahn, 472 F.2d 272, 289 n.21 (2d Cir.), cert. denied, 411 U.S. 982 (1973), in which the Court held that a corporation's claim that the grand jury testimony of a co-defendant/corporate officer could not be admissible against the corporation was "absurd."

After oral argument, Amrep submitted a letter to the Court (Exhibit 1 attached hereto), arguing that Geon was controlling because of a conflicting litigating posture between the officer and the corporation. In our responsive letter to the Court, and as we maintain now, the government has eliminated the originally-designated portions of Friend's grand jury testimony which arguably reflected a conflicting litigating posture between Friend and the corporation; there are no portions which we now seek to offer which exculpate Friend at the expense of the corporation, and therefore Geon does not apply. Rather,

Kahn is directly in point. The portions we seek to offer constitute Friend's knowledge of facts during the time period he has been an officer and director of Amrep. The portions now offered are not of the Geon-type such as we originally designated* which reflected Friend's attempt to exculpate himself by claiming or implying that Amrep had misrepresented things before he arrived at Amrep.

However, should the Court rule that, under Geon, this testimony is not admissible against Amrep, it is clear from the Court of Appeals decision herein that no Bruton problem exists which would bar the use of the testimony as against Friend at a joint trial with Amrep. As previously stated, the Geon and Kahn issue was posed to the Court of Appeals. While the Court did not rule on the corporate-admissibility question, it did rule that the grand jury testimony can "be admitted against Friend subject to a cautionary instruction that adequately protects these other defendants. United States v. Wingate, 520 F.2d 309, 311 (2d Cir. 1975)." Since this ruling was made in the face of Amrep's Geon argument, the Court's ruling clearly applies to all "other defendants," including AMREP.

* E.g., p.62, line 10 - p.64, line 19, of October 21, 1975.

AK:bmj
12-722

Accordingly, the government respectfully submits that the designated portions of Friend's grand jury testimony are admissible against Amrep, as well as against Friend.

Dated: December 16, 1976
New York, New York

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

PATRICIA M. HYNES
ALAN R. KAUFMAN
MICHAEL S. DEVORKIN
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-Of Counsel-

A 9508

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(1875-1931)

JOSEPH M. PROSKAUER
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MICHAEL A. CARDOZO
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HOWARD L. GANZ
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LAWRENCE J. ROTHENBERG

October 29, 1976

Honorable Ellsworth A. VanGraafeiland,
Honorable J. Edward Lumbard and
Honorable Dudley B. Bonsal
United States Courthouse
Foley Square
New York, NY 10007

Re: United States of America v. Amrep Corporation, et al.
Docket No. 76-1473

Honorable Sirs:

During the course of the oral argument in the above-captioned matter this morning reference was made to the fact that District Court Judge Charles M. Metzner ruled that the grand jury testimony of Solomon M. Friend was not admissible against the defendant corporations. The District Court premised this ruling on this Court's recent decision in Securities and Exchange Commission v. Geon Industries, Inc., et al., 531 F.2d 39 (2d Cir. 1976). We call the court's particular attention to the footnote at the bottom of page 43 of the opinion.

For the court's convenience, we are enclosing three copies of that opinion.

Respectfully yours,

Larry M. Lavinsky

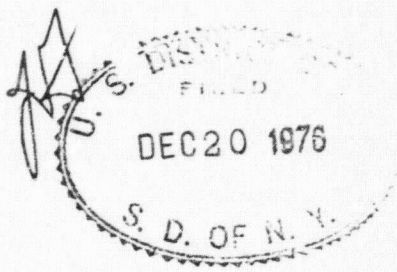
LML:jhr
Enclosures

Dictated but not read.

cc: Robert B. Fiske, Jr.
United States Attorney

EXHIBIT 1

A 9509



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
-against-	:	S 76 CR. 644 (CMM)
AMREP CORPORATION, et al.,	:	
Defendants.	:	

Amendment to Objections of Defendant Friend to Grand Jury Excerpts Designated by the Government on 12/11/76 for Offer Into Evidence

168

	evidence of the proof, nor probative as to Friend's actual knowledge.
9/9/75 P.M.	
p. 100, lines 8-20 (line 20 redacted to read: "50,000 families shows a conservative figure")	The answer, after the first sentence ("I don't know."), is speculative and mere guesswork, based upon the figures contained in the brief which was submitted to the United States Attorney.*
p. 118, lines 13-23 (with the first two words on line 13 redacted)	This Court has already excluded this excerpt on the grounds of vagueness, in addition to Bruton. (See Pretrial Conf. Tr. on 10/21/76, pp. 95-96.) Clearly, the answers amount to no more than guesswork.
9/11/75 P.M.	
p. 57, line 25, thru p. 60, line 13	This testimony has already been excluded by this Court as irrelevant (see Pretrial Conf. Tr. on 10/21/76, p. 98).
p. 69, line 13, to p. 70, line 3 and p. 71, line 22, to p. 72, line 9	This testimony relates to a memorandum dated Jan. 27, 1971 written by Mr. Friend concerning his closing of title as to the acquisition of additional property on Jan. 25, 1971. This Court has ruled that such evidence may be admissible as against Mr. Friend only if

* Again, the Government seeks to redact the reference to "the brief", which, again, would give the misleading impression that Mr. Friend had actual knowledge of the facts when, to the contrary, his knowledge was merely derivative from the brief.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
-against-	:	S76 Cr. 644 (CMM)
AMREP CORPORATION, et al.,	:	
Defendants.	:	

REPLY MEMORANDUM OF DEFENDANT FRIEND RELATING TO DESIGNATED EXCERPTS OF HIS GRAND JURY TESTIMONY.

We are reluctant to burden the Court with another memorandum on this subject, but we find that sufficient distortions are contained in the Government's Responses both to our objections and to the objections filed on behalf of AMREP to the admission of Mr. Friend's Grand Jury testimony to require a reply. For example, the Government claims (Pg. 3 of its response to AMREP's objections) that the designated portions supposedly "constitute Friend's knowledge of facts during the time period he has been an officer and director of Amrep". Not so. Thus:

1. The government claims in paragraph E(1) of its Response* that Friend's testimony concerning the number of homes

* Unless otherwise indicated, "Response" refers to the government's response to the objections which we filed on behalf of Mr. Friend.

built from 1969 through April 1975 is "support for his belief concerning Rio Rancho's rate of development". Actually, Mr. Friend was merely reciting from a list of information prepared in response to a question by the prosecutor at his prior appearance before the Grand Jury. He specifically stated (Tr. 9/9/75, p. 3) that "I don't have personal knowledge of this data. It was given to me by the computer people and other people who would have the information."

2. Mr. Friend's testimony (Tr. 9/4/75, pp. 70-73) as to projections of development at Rio Rancho reflect no more than hypothetical reasoning, not based upon personal knowledge. That testimony was in response to questions which were premised upon data set forth in the brief which defense counsel had submitted to the United States Attorney. At most, Mr. Friend was simply following the premise in the government's improper questions, not "adopting" the data contained in the brief. The government's suggestion in its Response (p. 4, n. 1) that "the source of the projection is immaterial" completely misses the point.

3. The government states in Paragraph F(2) of its Response that Mr. Friend's testimony on 9/9/75 (p. 118), "shows that Friend admits that at the rate of development, it will take 80 years just to fill up the company-owned building areas . . .". In fact, the "80 year" figure and the arithmetic upon which it was based were contained in Ms. Hynes' question and not in Mr. Friend's answer, which was, simply, "I guess that's right."

The government also argues (Response ¶A (3)) for the receipt of Mr. Friend's testimony concerning revisions of the script for the film, "Your Golden Future", supposedly to demonstrate that Friend was aware of what was ". . . shown to prospective Rio Rancho customers at the sales dinners." Again, the government misconstrues the evidence, which shows that Mr. Friend suggested revisions of the script, and conveniently overlooks the statement of Mr. Lavinsky, counsel for AMREP, that the film did not follow Friend's revisions as set forth in the revised script in at least four respects. (Tr. 2702-2703). Plainly, the admission of Friend's revisions of the script would not demonstrate Friend's awareness of what was then shown to prospective Rio Rancho customers at the sales dinners.

Further, the government suggests (Response ¶A(4)) that Mr. Friend's testimony concerning the brochure, "This Is My Land" is not exculpatory of him. We respectfully suggest that comparison of page 9 in GX 388 (the earlier version of the brochure) with page 9 in GX 389 (the brochure used after Mr. Friend's review)* will show that the evidence cannot be other than clearly exculpatory of Mr. Friend in this case. Thus, while purportedly offered by the government only as against Mr. Friend, this testimony, even with the redaction suggested by the government, could serve no purpose on the government's case except to prejudice the other defendants. The government's argument here is, we

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* These pages are annexed as Exhibits A and B hereto.

suggest, illustrative of their entire approach to, and rationale for, offering Mr. Friend's testimony. In turn, this evidence contradicts the government's claim on page 3 of its Response to AMREP's objections that the portions of the testimony which may inculpate the other defendants have been eliminated.

The government states in Paragraph G(1) of its Response that the testimony on 9/11/75, at pages 57-60, shows that "Friend knew there was plenty of available developable land closer to Albuquerque . . . ." In fact, Mr. Friend was merely describing what he saw while riding along Coors Road, and specifically testified as to the Volcano Cliffs property, "I said I didn't know whether it was developable." Not only has this Court already excluded this testimony as irrelevant, but at this point, it is plainly cumulative.

The government's Response (¶G(5)-(7)) to our objections to the testimony on 9/11/75 at pages 81-84 omits to state that this Court had specifically excluded these excerpts because, as designated, they were plainly misleading (Tr. 10/21/76, pp. 109-110). The testimony on those pages shows that Mr. Friend instructed AMREP personnel that no implication as to a resale market was to appear in the literature and that specific disclosure of the difficulty of resale was to be made in governmental filings which were given to customers. Thus, fairly read, the testimony indicates precisely the opposite of what the government contends. Moreover, as to resale, Mr. Friend was speaking of his knowledge

as of the date of his testimony (in September, 1975) and, therefore, would have no probative force at all as to any earlier date. And the government's proffer of evidence supposedly showing the absence of a resale market is directly contrary to this Court's ruling that such evidence is not admissible on the government's case.

Also, the government attempts (Response ¶H (1)) to justify reading Mr. Friend's testimony concerning commercial and multi-dwelling contracts, by arguing that Friend "admitted reading contracts for this type of Rio Rancho land . . .". But, in fact, Mr. Friend's testimony (Tr. 10/21/75, pp. 59-60) was that he had read "only the face of the contracts. I never reviewed the back of the contract." (And that review related only to a specific Truth In Lending provision). As numerous contracts received in evidence show, the exchange privilege would appear on the back, not the face, thereof. In short, the testimony is probative of nothing.

Finally, the government claims (Response ¶G(2)) that we were incorrect in stating that, according to the evidence, representations, if any, concerning Rio Rancho's land being almost sold out, ended in 1969. As noted in our objections, Mr. Lederman, Sales Manager for ATC, so testified unequivocally (Tr. 1827-32). The government points to the testimony of Masone, but if Masone made statements as he testified (Tr. 1956-57), he

obviously was acting contrary to Mr. Lederman, who, admittedly, was his superior at one point (Tr. 2039). Further, any such representations could not have been made until after April 1971, when Masone first joined ATC (Tr. 1934), and that was four months after the January 1971 memorandum which is the subject of Mr. Friend's testimony. Monaco's testimony (Tr. 2199-2200), also cited by the government, is not specific and is unclear what time period Monaco is speaking of. Even "victim" testimony tends to confirm Mr. Lederman's testimony. Thus, Mrs. Greenberg testified that, while she was told during the dinners which she attended in 1966 and 1968 that not much land was left, no such mention was made at the dinner which she attended in 1971 (Tr. 627). In short, the foundation required for the proffered evidence has not been established.

Conclusion

The government has erected a strained series of arguments, in an attempt to support the receipt of the designated portions of Mr. Friend's Grand Jury testimony. For the reasons stated previously and herein, the designated portions of the testimony should not be received in evidence.

Dated: December 17, 1976

Respectfully submitted,

ROGERS & WELLS
Attorneys for Defendant Solomon H. Friend
200 Park Avenue
New York, New York 10017

GROWTH...a predestined pattern

LAND...*a case of supply and demand*

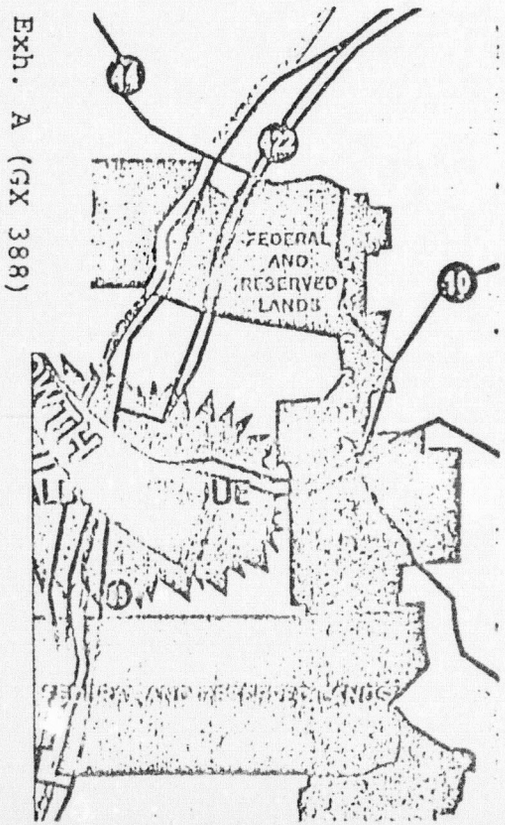
In the past 20 years land values in the Albuquerque area have increased at a rapid pace, averaging about 25% appreciation per year, but in many cases, as much as 300 to 400%.

As a city's population continues to grow... as more people move in... as the demand for land increases... land values in outlying areas five, ten, and even fifteen miles from the heart of the city tend to increase most rapidly.

In the past, when Amrep Corporation announced plans for a new community, prices on adjacent properties almost instantly jumped 100 to 300%.

Here are some selected examples of land value increases in different sections of the Albuquerque area:

Each one shows a series of transactions tracing the increases in value on a single piece of property over the years.



NORTHEAST SECTION

Example... (A)

Buena Ventura Addition, R-3 Property: Blocks 6 and 7, involving 6 lots #1 through 6

6 lots bought in 1958	$33,000
6 lots sold in 1963	59,200
Profit on $33,000 investment	$26,200
Percent of profit	79.3%
Percent of profit for each year	13.2%

Example... (B)

Central Avenue near Eubank Blvd. involving 8 acres

8 acres bought	$ 2,000
8 acres sold in 1960	8,000
Profit on $2,000 investment	6,000
Percent of profit	300%

NORTHWEST SECTION

Example... (C)

Quaker Heights area, within a few blocks of Rio Rancho Estates involving 15 acres

15 acres bought in 1942	$ 875
15 acres sold in 1955	5,000
Profit on $375 investment	4,625
Percent of profit	1,233%
Percent of profit per year	89%
15 acres resold in 1960	$20,000
Profit on $5,000 investment	15,000
Percent of profit	300%
Percent of profit per year	60%
Total profit made since 1942	$19,625
Percent of profit	5,206%
Percent of profit per year	226%

WESTERN SECTION

Example... (D)

Coors and Atrisco, involving 7 acres

7 acres bought in 1959	$10,000
7 acres sold in 1960 (8 months)	28,000
Profit on $10,000 investment	$18,000
Percent of profit	180%
Percent of profit per year	270%

Example... (E)

Fronting Central Ave. near Four Hills Road, involving 10 acres

10 acres bought in 1958	$18,000
10 acres sold in 1959	40,000
Profit on $18,000 investment	$22,000
Percent of profit	122%
Percent of profit per year	122%

Example... (F)

Airport Road between Central and Airport, involving 5 acres

5 acres bought in 1933	$ 300
5 acres sold in 1959	45,000
Profit on $300 investment	$44,700
Percent of profit	11,566%
Percent of profit per year	361%

SOUTHWEST SECTION

Example... (G)

Coors Boulevard between Foothills Drive and Eduardo Road, involving 13 acres

13 acres bought in 1946 — $520

7 acres sold in 1947	$ 1,120
Profit on $280 investment	840
Percent of profit	300%
Percent of profit per year	300%
7 acres sold in 1959	$ 7,000
Profit on $1,120 investment	5,880
Percent of profit	525%
Percent of profit per year	43%
7 acres sold in 1962	$15,000
Profit on $7,000 investment	8,000
Percent of profit	114%
Percent of profit per year	38%
Total profit since 1946	$14,720
Percent of profit	5,257%
Percent of profit per year	328%
6 acres sold in 1947	$ 420
Profit on $240 investment	180
Percent of profit	75%
Percent of profit per year	75%
1 acre sold in 1947	$ 500
Profit on $70 investment	430
Percent of profit	614%
Percent of profit per year	614%
5 acres sold in 1961	$ 8,750
Profit on $350 investment	8,400
Percent of profit	2,400%
Percent of profit per year	171%
1 acre sold in 1962	$ 2,150
Profit on $1,750 investment	400
Percent of profit	23%
Percent of profit per year	23%
Total profit since 1946	$10,580
Percent of profit	4,408%
Percent of profit per year	275%
Total profit on 13 acres (original investment of $520)	$25,300
Percent of profit	4,865%
Percent of profit per year	270%

Exh. A (GX 388)

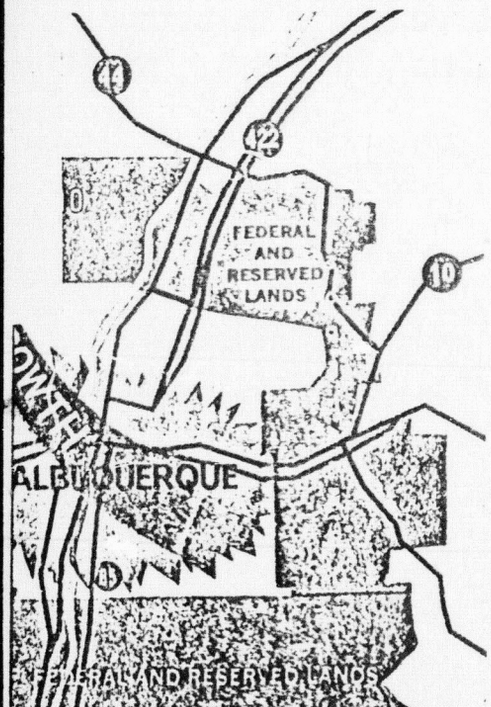
A 9517

GROWTH...a predestined pattern

A 9518

LAND...*a case of supply and demand*

In the past 20 years, land prices in the Albuquerque area have increased at a rapid pace, averaging about 25% per year, but in many cases accelerating as much as 300 to 400% in a given year.



NORTHEAST SECTION

Example . . . (A)

Buena Ventura Addition, R-3 Property: Blocks 6 and 7, involving 6 lots #1 through 6

6 lots bought in 1958	$33,000
6 lots sold in 1963	59,200

Example . . . (B)

Central Avenue near Eubank Blvd. involving 8 acres

8 acres bought	$ 2,000
8 acres sold in 1960	8,000

NORTHWEST SECTION

Example . . . (C)

Quaker Heights area, within a few blocks of Rio Rancho Estates involving 15 acres

15 acres bought in 1942	$ 375
15 acres sold in 1955	5,000
15 acres resold in 1960	$20,000

WESTERN SECTION

Example . . . (D)

Coors and Atrisco, involving 7 acres

7 acres bought in 1959	$10,000
7 acres sold in 1960 (8 months)	28,000

As the city's population continued to grow . . . as more people moved in . . . as the demand for land increased . . . land prices in the vicinity of metropolitan Albuquerque tended to increase in relation to such growth.

Obviously, no one can predict the future with any certainty. And no one can accurately forecast how population, inflation and other factors may affect the price of land. All we can do is look at what has happened in the past.

Accordingly, we are presenting here some selected examples of land price increases in different sections of the Albuquerque area. Each one shows transactions tracing the increases in price on various pieces of property over the years. These are strictly factual records and do not, in any way, represent or imply a promise or prediction of future land values or prices which, of course, depend on location, rate of development, marketability, population growth plus other factors.

Example . . . (E)

Fronting Central Ave. near Four Hills Road, involving 10 acres

10 acres bought in 1958	$18,000
10 acres sold in 1959	40,000

Example . . . (F)

Airport Road between Central and Airport, involving 5 acres

5 acres bought in 1933	$ 300
5 acres sold in 1959	45,000

A 9519

ARK:bj
12-719

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :

-v- : RESPONSE TO THE OBJECTIONS OF THE DEFENDANT FRIEND TO THE DESIGNATED PORTIONS OF FRIEND'S GRAND JURY TESTIMONY

AMREP CORPORATION, et. al. :

Defendants. :

S. 76 Cr. 644

The following constitutes the government's response to Friend's objections to the portions of his grand jury testimony which the government intends to offer.

A. 7/24/75

1).	p. 10, line 18 through p. 11, line 20; p. 13, lines 2-13	In view of this Court's earlier ruling this offer is withdrawn.
2)	p.14, lines 6-21	This shows that Friend was responsible for reviewing Amrep's advertising and promotional material concerning Rio Rancho Estates, a fact not made any less material by the lack of an enumeration of each and every such item of advertising and promotional material. Friend's responsibility for reviewing such material puts him on notice of the claims and representations which Amrep was making to the public. The Court has previously ruled that this can be read (Pretrial Conf, 10/21/76, pp. 49-50).
3).	p. 19, lines 11-20,25 (as redacted), and p.20 lines 2-6, 8-10	This shows that Sol Friend reviewed the script for the film "Your Golden Future", which demonstrates that Friend was aware of what was being said and shown to prospective Rio

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19

A 9520

Rancho customers at the sales dinners. The Court previously ruled that this can be read (Pretrial Conf., 10/21/76, p. 50).

4). p.32, line 14 through p. 33, line 15.

This testimony shows that Friend reviewed and was familiar with the most significant portion of the brochure "This Is My Land", specifically, pages 8 and 9, which contained Amrep's main investment pitch concerning Albuquerque's growth and what affect that growth would have on Rio Rancho Estates. While we disagree with the defendant's contention that the changes in the brochure are exculpatory of Mr. Friend, even if true that should not be a bar to admissibility. Indeed, Friend's opposition to admissibility given his view of its import seems contradictory. We agree to redact the last four words on line 12 and the two words on line 13 of page 33. The Court previously ruled that this can be read. (Pretrial Conf., 10/21/76, p. 50).

5). p. 48, line 19 through p.49, line 23.
p.52, lines 13-19.

This testimony demonstrates Friend's knowledge that there was no resale market for Rio Rancho land at a time when Rio Rancho land was being sold as a safe and secure financial investment, better than the stock market, mutual funds, and savings banks. It is not cumulative of other evidence previously offered because this shows Friend's knowledge of the absence of a resale market.

ARK:bj
12-719

		The Court previously ruled that these portions could be read (Pretrial Conf., 10/21/76, pp. 52-53).
B.	7/31/75 a.m.	
	1). p. 29, line 19 through p.30, line 5.	This portion is relevant because it shows Friend's knowledge that "something can be misleading by your failure to disclose a material fact as well as the affirmative misrepresentation of a fact." The Court previously ruled that this could be read. (Pretrial Conf., 10/21/76, p.85).
C.	7/31/75 p.m.	
	1). P. 10, line 21 through p.12, line 2.	Friend objects to this portion as being cumulative of other testimony already in the record. That is not accurate, since this is the first offer of proof showing Friend's knowledge of the facts stated in his testimony. The Court previously ruled that this could be read. (Pretrial Conf., 10/21/76, p. 88).
D	9/4/75 a.m.	
	1). p. 63, line 23 through p. 64, line 7; p.64, line 15 through p. 65, line 25 (line 16 redacted).	Friend objects to this testimony as being simply speculation. This testimony relates to the rate of development at Rio Rancho Estates, and expresses Friend's opinion that Rio Rancho Estates would not be developed in his lifetime, not until the year 2010. Friend's belief on this subject is highly relevant, in view of the fact that purchasers of Rio Rancho land, buying for investment, did so with the expectation that development was proceeding rapidly, development which would increase the value of their "investment". Had purch-

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A 9522

asers known that Rio Rancho wouldn't be developed in their lifetime the prospect of Rio Rancho land being a good investment certainly diminishes. This is doubly true with respect to purchasers of commercial property, multiple-dwelling lots, and ranchettes, land which had no exchange privileges and therefore whose "value" was entirely dependent upon development reaching that property. The Court previously ruled that this could be read. (Pretrial Conf., 10/21/76, p. 90).

2). p.70, line 12 through p.71, line 10 (delete "in the brief" on line 4, p.71); p. 71, line 20 through p.72, line 19 (delete line 12); p.73, lines 9-18.

This testimony is an immediate follow-up of the preceding testimony, wherein Friend adopts a projected growth figure for Rio Rancho of 1000 people per year,* and agrees that it would take 200 years to arrive at 70,000 homes.** Obviously, such information would have been extraordinarily relevant to the Rio Rancho customers buying land there as an investment. Moreover, this is not information that Friend was learning about for the first time in the grand jury or from reading the brief as he would suggest; as GX's 573, 577, 578, 581, 586, 587, 662, and 963 for identification show, Friend had responsibility for construction and development at Rio Rancho and therefore had to have been aware of the rate of development. Accordingly, his belief concerning the rate of development is more than speculation. The Court previously ruled this out on Bruton grounds, which issue has been resolved. (Pretrial Conf., 10/21/76, pp. 91-93), and also mentioned that portions were argumentative (p.94). We believe we have now omitted any argumentative portions.

* The government submits that the source of that projection is immaterial so long as Friend adopted it, which he did, and therefore, we have redacted the references to the "brief."

** Which would almost be full development.

ARK:gdd
12-719

E. 9/9/75 a.m.

1). p.2, line 15 through p.4, line 12.

This testimony relates to actual home-building figures for Rio Rancho from 1969 through April 1975, an area that Friend was familiar with, and is therefore support for his belief concerning Rio Rancho's rate of development. The Court previously ruled that this could be read (Pretrial Conf., 10/21/76, p. 94).

F. 9/9/75 p.m.

1). p. 100, lines 8-20 as redacted.

This testimony relates to D 2, supra, and would be read right after that.

2). p. 118, lines 13-23, as redacted.

The government has excluded the portion of its original designation which caused the vagueness (line 12), and it shows that Friend admits that at the rate of development, it will take 80 years just to fill up the company-owned building areas, with no utilities being extended to other lots. This has especially profound im-plications for purchasers of commercial, multi-dwelling and ranchette property, who, being without an exchange privilege, have to await the arrival of utilities before their land is worth anything. The Court's main objection, the Bruton issue, has been resolved.

K:bj
-719

G. 9/11/75

1). p. 57, line 25 through p. 60, line 13.	The Court did exclude this on October 21, 1976 as being irrelevant. However, the Government respectfully submits that the testimony adduced at trial demonstrates its relevance, to wit, that Amrep claimed that Albuquerque could only grow to the northwest, to and through Rio Rancho, thus making it a good investment. Yet, as Friend knew, there was plenty of available, developable land closer to Albuquerque, both west (Volcano Cliffs) and northwest (Paradise Hills) of Albuquerque, which could accommodate a substantial number of people.
2). p. 69, line 13 to p. 70, line 3; p. 71, line 22 to p. 72, line 9.	The Court previously allowed in this testimony. (Pretrial Conf., 10/21/76, pp. 99-101). Friend objects because he claims that the testimony at trial shows that Amrep's representations about Rio Rancho being almost sold out ceased in 1969 when the additional land began to be acquired. Friend however, ignores the testimony of Masone and Monaco, who testified that such representations were made after 1969. (See Trial Tr. pp. 1956-57; 2199-2200).

ARK:gaa
12-719

3). p. 75, lines 12-15 — This shows Friend's knowledge that as of September 11, 1975 (some 15 years after Rio Rancho began.) it was only 5% developed, a fact not stated nor even intimated to customers at the dinner parties, and relevant to how long it will take Rio Rancho to substantially or fully develop, if ever. Moreover, it is not cumulative, since it shows Friend's knowledge of the facts related therein. The Court previously ruled that it could be read (Pretrial Conf. 10/21/76, p.101).

4). p. 77, lines 10-17
5). p. 82, lines 10-12 — These portions pertain to Friend's knowledge of no resale market, and will be read in conjunction with A5.

6). p. 83, lines 6-12 — This constitutes Friend's admission of what a long-term investment is (10-15 years), an admission which is relevant when viewed in light of Amrep's claim that Rio Rancho was sold as a long-term investment, and in light of the proof concerning Rio Rancho's rate of development which shows that it will be centuries before it is fully developed.

7). p. 84, lines 8-13 — Friend herein states that the only reason that purchasers were not told that there was no resale market was because no specific regulation required it. This exemplifies Friend's attitude about making disclosure of material facts to prospective purchasers: even though Rio Rancho land was being sold as an investment, one which was better than stocks and mutual funds and savings accounts thus implying liquidity (what good is a safe and secure "investment"

if it cannot be cashed in?), there was no disclosure about the lack of a resale market simply because no regulation required it.

H. 10/21/75 p.m.

1). p. 58, line 20 through p.60, line 21, as redacted.

This testimony reveals that Friend, an officer, director, and chief legal official of Amrep, claimed to have been unaware until 2 weeks before October 21, 1975, that commercial and multidwelling purchasers did not have an exchange privilege. It shows that Friend, who admitted reading contracts for this type of Rio Rancho land, never realized that the contracts did not contain the exchange privilege. To the extent that the testimony is credible it bears on whether Friend adequately complied with his duty to know and find out essential facts. To the extent that defense counsel have tried to impeach customer/witnesses who claimed that they thought they were receiving the same exchange privilege on their commerical land as they had on their residential land (e.g., see testimony of Finnen, Tr. pp. 1481-82, 1519), Friend's equivalent ignorance demonstrates that that was a belief not solely endemic to the witnesses called by the government. The Court previously ruled that this could be read (Pretrial Conf., 10/21/76, p. 112).

Dated: December 15, 1976

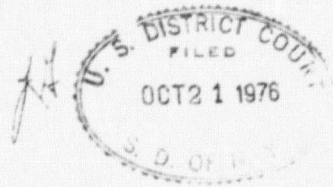
Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

PATRICIA M. HYNES
ALAN R. KAUFMAN
MICHAEL S. DEVORKIN
JOHN F. KALEY,
Assistant United States Attorneys
-Of Counsel-

A 9527

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



----------X

UNITED STATES OF AMERICA, :

-against- :

AMREP CORPORATION, et al., :

Defendants. :

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NOTICE OF MOTION

S 76 Cr. 644 (CMM)

S I R :

PLEASE TAKE NOTICE that upon the annexed affidavit of Stanley S. Arkin, sworn to on October 21, 1976, the memorandum of law submitted herewith, and all proceedings previously had herein, defendants Howard Friedman and Henry Hoffman will move in this Court at 10:00 a.m. on the 26th day of October, 1976 or as soon thereafter as counsel will be heard in Room 35 of the United States Courthouse of the Southern District of New York, Foley Square, New York, New York, for an order pursuant to Rule 14 of the Federal Rules of Criminal Procedure severing their trial from that of the corporate co-defendants and for such other and further relief as to the Court may seem just and proper.

DATED: New York, New York
October 21, 1976

Yours, etc.,

STANLEY S. ARKIN, p.c.
Attorneys for Defendants
Howard Friedman
Henry Hoffman
300 Madison Avenue
New York, New York 10017

TO: HONORABLE ROBERT B. FISKE, JR.
United States Attorney
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007

101

A 9528

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, :

AFFIDAVIT

-against- :

S 76 Cr. 644 (CMM)

AMREP CORPORATION, et al., :

Defendants. :

----------X

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

STANLEY S. ARKIN, being duly sworn, says:

I am a member of the firm of STANLEY S. ARKIN, P.C.. We represent Howard Friedman and Henry Hoffman, defendants in the above-entitled proceeding. I submit this affidavit in support of Messrs. Friedman's and Hoffman's application to sever their trial from that of the corporate defendants.

The basis for our application is that there is an enormous disparity in the volume of evidence that may be admissible against the corporation and the evidence which may be admissible against my clients. This circumstance will necessarily result in an improper "spill-over" or "rub-off" which cannot be cured other than by a severance.

271 exhibits potentially admissible against the corporation are not, as we demonstrate in our accompanying memorandum of law, admissible against the individuals.

Aside from the unfair prejudice to the individuals arising from the "spill over" effect of the many documents

admissible only against the corporation, there is a certainty that absent a severance, the requirement of limiting instructions will unnecessarily confuse the jury and cause intolerable procedural and mechanical problems in the conduct of the trial.

The spectre of certain of the individuals objecting to documents admissible against only the corporations on a frequent basis with, perhaps, consequent cautionary instructions persistently issued by the Court to the jury would render the trial extremely and unnecessarily confusing. Cautionary instructions in favor of one individual or two individuals and not the otners or all the individuals but not the corporations would degenerate into a byzantine maze of do's and don'ts during the course of a 6 month trial, will not be understood by any jury or for that matter anybody else participating in the case.

The nature of this case with its vague charges, its wide shotgun approach and the extraordinary petty persnickety and multitudinous pieces of evidence, is such that problems of admissibility, "spill-over" and "rub-off" are bound to be more exacerbated. The prosecutrix has chosen to approach what she believes to be some kind of wrongful conduct by this blunderbuss, all consuming indiscriminate approach, and should not be permitted to take advantage of the confusion and intolerable procedural difficulties created.

WHEREFORE, the motion for severance should in all respects be granted.

Stanley S. Arkin

Stanley S. Arkin

Sworn to before me this
28th day of October, 1976

Notary Public

ALICE LYNN WITKOWSKI
Notary Public, State of New York
31-4525272 - New York County
Commission Expires March 30, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, :

-against- : S 76 Cr. 644 (CMM)

AMREP CORPORATION, et al., :

Defendants. :

----------X

MEMORANDUM OF LAW

This memorandum is submitted in support of Henry Hoffman's and Howard Friedman's motion made pursuant to Rule 14 of the Federal Rules of Criminal Procedure for a severance of their trial from that of the corporate defendants.

INTRODUCTION

The government's documentary exhibits raise serious problems which require the severance of the individual defendants from the corporate defendants. A substantial number of the exhibits are admissible, if at all,* against only the corporate defendants. The result is a trial where the greater amount

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*For the purpose of this motion, defendants assume that the government's documentary exhibits will be properly authenticated at trial. Moreover, various other objections defendants have as to the exhibits, such as that they are irrelevant, that they contain opinions and privileged matters, and that they are illegible, are not reiterated in and not the basis for this motion.

(and most significant) of the prosecution's evidence will have a certain and powerful impact on individuals against whom it is inadmissible. Because of the vast number of documents the government intends to introduce during a trial which may last upwards of six months, this Court cannot give and jurors are incapable of either understanding or fairly applying the kind of instructions required to limit the proper consideration of each exhibit vis-a-vis each defendant.

The individual defendants are entitled to a trial separate from that of their corporate co-defendants where the jury will be able to assess the government's case against the individuals without being swamped by thousands of pages of documents admissible only against the corporations, i.e., without the individuals being subjected to a necessary "spill-over" or "rub off" effect of the evidence against the corporation.

ARGUMENT

The Individual Defendants Are Entitled to a Trial Separate from that of the Corporate Defendants Because at a Joint Trial the Impact of a Substantial Number of Government Exhibits Admissible Only Against the Corporations Will Inevitably Spill-Over onto the Individuals Depriving Them of a Fair Trial.

The government will seek to introduce against all defendants 271 documentary exhibits containing statements of non-conspirator corporate agents and employees made to both third parties and also other corporate agents and employees.

Aside from establishing authenticity and relevance and surmounting other defense objections which may be made, the government must rely on three alternate theories of admissibility to overcome the objection that the documents contain hearsay: (1) that the documents contain statements by corporate employees concerning matters within the scope of and made during their employment (Rule 801[d][2][D] of the Federal Rules of Evidence); (2) that the documents contain statements by coconspirators made during the course of and in furtherance of a conspiracy (Rule 801[d][2][E] of the Federal Rules of Evidence); (3) that the documents are records of a regularly conducted activity, i.e., that they are "business records" (Rule 803[6] of the Federal Rules of Evidence).

These evidentiary principles however would, at most, permit a substantial number of the government's exhibits to be introduced only against the corporate defendants for the truth of the matter contained in them (agent's statements to third parties) and, in some limited cases, against the corporate defendants and certain individuals who received them to establish knowledge that such a statement was made.

The improper prejudicial and, indeed, unmanageable consequence is that a bulk of the government's exhibits are admissible for their truth only against the corporate defendants and will require countless different limiting instructions as to the proper consideration which may be given by the jury to

each document vis-a-vis each individual defendant. In the course of this lengthy trial the numerous myriad of instructions necessarily to be given in the circumstances is worthy more of an ancient Byzantium trial with the issues being the existence of imagined demons than of a modern day criminal trial such as this.

We submit that under such circumstances there must be a severance of the individual defendants from the corporate defendants.

1. Documents Containing Statements by Corporate Agents and Employees who are Not Alleged to Be Coconspirators Are Not Admissible for their Truth against the Individual Defendants.

An out-of-court statement by an agent or employee of one of the corporate defendants to a third party is admissible against the corporations for the truth of the statement if made "concerning a matter within the scope of his agency or employment, [and] made during the existence of the relationship" (Rule 801[d][2][D] of the Federal Rules of Evidence). Such statements, admissible against the principal corporations as a matter of agency law* for their truth are clearly not admissible

*Whether an employee's or agent's admissions are admissible for their truth against the principal is determined by the law of agency. Baughman v. Cooper - Jarrett, Inc., 530 F. 2d 529 (3d Cir. 1976); Northern Oil Co. v. Socony Mobil Co., 347 F. 2d 81, 85 (2d Cir. 1965).

for that purpose against the individual defendants simply because they happen to be agents of the same principal. United Towing Co. v. Philips, 242 F. 2d 627, 630 (5th Cir. 1957), cert. denied, 355 U.S. 861 (1957); cf. Cory Mann George Corp. v. Old, 23 F. 2d 803, 810 (4th Cir. 1928).*

Nor are agent's statements to third parties admissible against the individual defendants as coconspirator declarations. With the exception of the defendants and Messrs. Monaco and Geller, no corporate employee or agent has been designated as a coconspirator (coschemer). And the government cannot, by the device of naming a corporate principal as a coconspirator or coschemer, bootstrap all corporate employee's and agent's statements through the corporate structure to transform them from inadmissible hearsay declarations of non-conspirators into coconspirator declarations. The point is, that a corporation, even if proved to be a coconspirator (or coschemer) unlike a real human alleged coconspirator may not be said to authorize statements of non-conspirator declarants on behalf of alleged coconspirators.

In Flintkote Co. v. Lysfjord, 246 F. 2d 368, 384,

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*In Cory Mann George Corp. v. Old, supra, the Fourth Circuit, in a closely related context, wrote as follows (id., 23 F. 2d at 810):

> "Notice to the employees of the corporation was notice to the corporation but not to its officers and directors."

n. 19 (9th Cir. 1957), the Ninth Circuit summarily rejected the theory that statements of employees of a corporate conspiracy defendant are coconspirator declarations:

> "...it cannot be seriously urged that naming a corporate defendant a coconspirator makes every employee of said corporation a coconspirator, subject to the rules of evidence which related to a conspiracy."

Lastly, the government may contend that the documents are admissible as business records. But a letter or memorandum written by a corporate agent or employee (such as those at issue here) is plainly not a "memorandum... [or] record...of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by a person with knowledge,...[and] kept in the course of a regularly conducted business activity...[the] regular practice of...[which was] to make the memorandum...[or] record..." (Rule 803[6], Federal Rules of Evidence).

The underlying logic of permitting the introduction of true business records into evidence for the truth of their contents--that the systematic and habitual keeping of records of events is relied upon by a business entity as an accurate record of what actually occurred--compellingly establishes the fallacy in the government's contention that documents containing agent's statements are business records. Letters, memoranda and other written statements by corporate employees and agents are communications, and not records of the systematic

conduct of a business. Palmer v. Hoffman, 318 U.S. 109 (1943); and see Advisory Committees Note to Rule 803[6] of the Federal Rules of Evidence.

There are approximately 271 government exhibits* in this category which, if admissible at all, are admissible for the truth of their contents only against the corporate defendants as admissions of agents and employees. Evidence that a defendant may have received a copy of such employee's or agent's communications to third parties may make certain of the exhibits admissible on the limited issue of whether that particular defendant knew the agent or employee made the statement.

Thus, in addition to the massive number of exhibits admissible for the truth of their contents only against the corporate defendants, some of that evidence would, at a joint trial, require at least three instructions: that the jury may consider the exhibit for the truth of the matter contained as against the corporate defendants; that the jury may consider

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*Government exhibits 20; 108H; 108K; 109G; 137F; 146T; 149C; 149O; 149U; 149W; 152D; 169C; 169E; 180E; 203; 236B; 236D; 237; 238; 256; 293; 294; 295; 296; 313; 346O; 346P; 346Q; 346R; 346S; 346T; 346U; 346V; 346W; 352; 424 (1-2); 428; 461; 462; 463; 464; 466; 467; 473; 475; 476; 477; 485; 487; 490; 491; (1-2); 493; 495A; 495B; 498; 501G; 501H; 501I; 501K; 501M; 501O; 501AA 501EE; 501OO; 502C; 502D; 501F; 502G; 502T; 502J; 502L; 502M (1-2); 504C; 505B; 508B; 508C; 508E (1-3); 510A; 511A (1-2); 512B; 513A; 513D; 513E; 513F; 513G; 513J; 516; 523; 534; 535; 540; 553; 559; 564; 592; 597; 617; 620; 637; 638; 641; 642; 643; 645; 647; 648; 649; 650; 651; 652; 653; 654; 655; 656; 657; 658; 659; 661; 664; 712; 713; 717 719; 720; 721; 724; 726; 729; 733; 747; 749; 750; 765; 770; 772 (1-2); 775; 776; 777; 804; 814; 821; 825; 831; 833 (1-3); 837; 841; 842 (1-4); 850; 855; 856; 872; 877; 878; 879;

the exhibit as evidence that particular individual defendants knew the statement was made but not for its truth; and that the jury may not consider the exhibit for any purpose whatever as against the individual.*

2. Under such Circumstances the Individual Defendants are Entitled to a Trial Separate from that of the Corporate Defendants.

At a joint trial the individual defendants will be seriously prejudiced by the introduction of over 271 government exhibits admissible for their truth only against the corporate defendants. Because a few of the 271 exhibits may also be

(ftn. cont'd.)
880; 882; 890; 891; 893; 894; 895; 896; 900; 901; 903; 904; 905 (1-2); 908; 909; 910; 911; 913 (1-2); 914; 915; 916; 917; 919; 920; 921; 922; 923; 924; 925; 926; 928; 932; 950; 952; 958; 959; 961; 963; 965; 967; 970; 975; 977; 978; 979; 980; 981; 983; 987; 988; 989; 992; 1000; 1001; 1004; 1005; 1006; 1007; 1020; 1022; 1023; 1024; 1025; 1028; 1030; 1031; 1032; 1028; 1029; 1033; 1034; 1035; 1037; 1038; 1039; 1040 (1-2); 1049; 1052; 1053 (1-2); 1057; 1059; 1062; 1063; 1065; 1078; 1094; 1095; 601; 986; 976; 971; 918; 993 (1-2); 996; 997; 998 (1-4); 999.

*For example, government's exhibit 909 is a memorandum from Richard Gangel a corporate employee, to six other corporate employees and a carbon copy to Daniel Friedman and two other corporate employees. If admitted into evidence the proper remitting instructions would have to be as follows: the document may be considered for the truth of its contents against the corporate defendants; the document may be considered as evidence that Daniel Friedman had knowledge that Richard Gangel made the statement contained in the exhibit but not for the truth of its contents; and the documents may not be considered for any purpose against any other defendant.

admissible against certain individual defendants as evidence of knowledge that statements contained in the exhibits were made, this Court will be required to give at least three different types of limiting instructions on each exhibit.

Under such circumstances where there is a great disparity* in the amount of evidence admissible against the individual defendants as compared with the corporate defendants and where the court's instructions to the jury on the limited considerations to be given to each of 271 exhibits vis-a-vis each of 10 defendants cannot be understood or properly applied by the jury, a severance of the individuals from the corporation is required. Rule 14, Federal Rules of Criminal Procedure; United States v. Kelly, 349 F. 2d 720, 756-759 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966); United States v. Branker, 395 F. 2d 881, 888-889 (2d Cir. 1968); cf. United States v. Mardian, ____ F. 2d ____, No. 75-1383 (D.C. Cir. October 12, 1976).

It is fundamental that in a complex, multi-count and multi-defendant trial, a severance is required where there is a substantial disparity in the amount of evidence against the various defendants. In such a case there is a clear and

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*Indeed, apart from S-1s, minutes of Boards of Directors and similar formal documents (Exhibits 215, 395, 396, 399, 400, 400A, 400B, 401, 402, 409, 409B, 410, 940, 1081), a questionnaire on stock ownership (Exhibit 469) and a contract (Exhibit 637), there are only 3 exhibits authored by or signed by Henry Hoffman (Exhibits 511A, 629 and 632).

present danger that evidence admissible only against certain defendants--here, the corporate defendants--will improperly "spill-over" or "rub-off" onto the others. Especially in the case at bar where the individual defendants are all officers and directors of the several corporate defendants the "dangers of transference" of evidence admissible only against the corporations onto the individuals are so overwhelming that this Court should use "every safeguard to individualize each defendant in his relation to the mass." Kottleakos v. United States, 328 U.S. 750, 774 (1946).

In Blumenthal v. United States, 332 U.S. 539 (1947), the Supreme Court recognized the inherent dangers of a joint trial where there is an accumulation of a mass of evidence admissible only against certain defendants. The Court cautioned that each defendant must be protected against these dangers by safeguards such as "clear rulings on admissibility, limitations of the bearing of evidence as against particular individuals, and adequate instructions. . . ." (Id., 332 U.S., at 559-60). Mr. Justice Rutledge wrote as follows (id.):

> "It is therefore extremely important that those safeguards be made as impregnable as possible."

In the case at bar the issues are too complex, the length of trial too long, the number of defendants and the

government exhibits far too many and the permutations of "the bearing of evidence as against particular individuals" too unmanageable for the safeguards suggested in Blumenthal to be "impregnable." It is precisely such a situation in which the Second Circuit has ruled that a severance is required because "no amount of cautionary instructions [can] . . . undo [ ] the harm. . ." United States v. Kelly, supra, 349 F. 2d 720, 758. Cf. Bruton v. United States, 391 U.S. 123, 137 (1968); United States v. Ciancetti, 315 F. 2d 584, 590-591 (2d Cir. 1963).

As Judge Medina wrote in United States v. Kelly, supra, 349 F. 2d 720, in concluding that severance was the proper remedy "peculiarly applicable" for a defendant "prejudiced by the accumulation of evidence" admissible only against his co-defendants:

> "Surely [cautionary instructions] were not such as to constitute an 'impregnable' barrier against the use of this testimonial and documentary evidence. . ." (Id., at 758.)

Unlike Kelly where the trial court did not know prior to trial that there was a disproportionate amount of evidence against certain defendants, in the instant case the government's premarked trial exhibits have already graphically demonstrated that the substantial bulk of its evidence will be

admissible only against the corporate defendants. Since an enormous number of differing kinds of cautionary instructions such as will be required here to limit absolutely the admissibility as well as the evidentiary effect of 271 exhibits vis-a-vis 10 different defendants cannot realistically serve to protect the individual defendants from a mass of exhibits inadmissible against them, the only "impregnable" safeguard is severance of the individuals from the corporations.

CONCLUSION

The motion to sever the trial of the individual defendants from that of the corporate defendants should be granted.

DATED: New York, New York
October 21, 1976

Respectfully submitted,

STANLEY S. ARKIN, p.c.
Attorneys for Defendants
Howard Friedman
Henry Hoffman
300 Madison Avenue
New York, New York 10017

OF COUNSEL
Stanley S. Arkin
Mark S. Arisohn
Lee Cross

So. Dist.
Judge Metzner
76 CR 644
76 CR 1023

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED OCTOBER 20, 1976
A. DANIEL FUSARO, CLERK

A 9542

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A26

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of October, one thousand nine hundred and seventy-six.

Present: HON. J. JOSEPH SMITH

HON. JAMES L. OAKES

HON. WILLIAM H. TIMBERS

Circuit Judges.

FILED
U.S. DISTRICT COURT
S.D. OF N.Y.
OCT 79 10 08 AM '76

United States of America,
Plaintiff-Appellee,
v.
Amrep Corporation, Rio Rancho Estates, Incorporated, ATC Realty Corporation, Howard M. Friedman, Chester Carity, Irving M. Blum, Henry L. Hoffman, Herman B. Oberman, Solomon H. Friend and Daniel Friedman,
Defendants,

Solomon Friend,
Defendant-Appellant.

76-1427

Treating the notice of appeal filed herein together with appellant's motion for a stay and appellee's motion to dismiss as a petition for a writ of mandamus; and oral argument having been heard,

Upon consideration thereof, it is

Ordered that the petition for a writ of mandamus be and it hereby is denied.

A. DANIEL FUSARO
Clerk

by Edward J. Guardaro
Edward J. Guardaro
Senior Deputy Clerk

A true copy.
A. Daniel Fusaro Clerk

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-against- : S 76 Cr. 644 (CMM)

AMREP CORPORATION, et al., :

Defendants. :

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MEMORANDUM

This memorandum is submitted in response to defendants' joint memorandum on the impact of the new superseding indictment. The defendants have itemized examples of what they contend may be material changes in wording in the superseding indictment. For the convenience of the Court we have taken the examples cited by the defendants and have set them forth on a chart which is annexed hereto as Exhibit A. The chart contains the language in the original indictment and the language in the superseding indictment.

We believe the chart clearly demonstrates that the superseding indictment has not enlarged the issues and proof as the defendants contend, rather it has deleted repetitive allegations and evidentiary detail which will enable the Government to concentrate on the most important facts and issues at the trial. The superseding indictment will free the Government from the pressures of having to offer substantial evidence in support of each and every allegation of the original indictment in all of its specificity. As we stated to the Court in our letter of July 22, 1976, as a result of the superseding indictment we simply no longer need all of the evidence probative of each allegation in the original indictment.

Dated: New York, New York
July 26, 1976

Respectfully submitted,
Patricia M. Hynes
ROBERT B. FISKE, JR.,
United States Attorney for the
Southern District of New York
Attorney for the United States
of America.

PATRICIA M. HYNES,
ALAN R. KAUFMAN,
MICHAEL DEVORKIN,
Assistant United States Attorneys
- Of Counsel -

TO: All Defense Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA :

- v - : S 76 Cr. 644 (CMM)

AMREP CORPORATION, et al., :

Defendants. :

- - - - - - - - - - - - - - - - - - - -x

GOVERNMENT'S EVIDENCE MEMORANDUM ON PROOF OF MISLEADING STATEMENTS IN A MAIL FRAUD SCHEME

Preliminary Statement

The Court has ruled on November 10, 1976 that the Government must prove that representations made to customers were false in order to prove a scheme to defraud. We respectfully submit that the Government can prove that statements while literally true were nonetheless intentionally misleading and therefore violative of the mail fraud statute. Moreover, this court has so held in a decision dated June 30, 1976.

FACTS

The Government offered in evidence, GX 384, a promotional pamphlet used by defendants at sales dinners called "This is My Land." Howard "Duke") Mandel, former Vice-President of sales for Amrep, testified that the

speaker at the dinners were instructed to direct the potential customers attention to this pamphlet and to specifically refer to pages 8 and 9 of that pamphlet. The scripts for the speakers presentations, which were actually used in the presence of Mr. Mandel, corroborate that these instructions were followed.

Page 8, which was read to the jury, states that "Albuquerque's future growth is predetermined . . . it must take place toward the northwest. And this is where most of the new growth activities are taking place." (emphasis in original). Page 8 goes on to say:

> That's why land values on the panoramic mesa to the northwest of Albuquerque are rising. The recent land transactions in the outer areas of greater Albuquerque offer the most dramatic evidence that "good land . . . well located . . . in an area where growth and expansion are taking place . . . is one of the surest and safest ways to make handsome returns on your investment." (Following are but a few of the documented transactions in real estate that have taken place in Albuquerque during the past few years. The facts are self-evidence!

On page 9 the following statement appears: "In the past, when A-Rep Corporation announced plans for a new community, prices on adjacent properties almost instantly

jumped 100 to 300%.* Page 9 then sets out various examples of profits made in the sale of land in the Albuquerque area. The Government read one of those examples to the jury, example G.

The Government does not contend that example G is false. The Government contends that example G and the other examples on page 9 were used to mislead people into believing that similar profits could be made on a purchase of Rio Rancho land. The Government's proof will show that this pamphlet, "This is My Land", was considered an important sales tool; that the land was sold as an investment for resale at a profit and these examples were used as an inducement to get people to buy Rio Rancho land at sales dinners as a financial investment which could be resold at a profit. The Government's proof will show that these examples while perhaps literally true** are intentionally misleading because

---

* The Government's proof will show that in 1961, the defendants paid $178 an acre for 54,000 acres and ten years later bought 31,000 acres of adjacent property for $180 an acre, for an increase of 1% in 10 years.

** We do not argue that they are false but we do not vouch that they're accurate.

they do not involve property which is comparable to Rio Rancho Estates.

The fact that the examples themselves may not be false is not the point as this court pointed out in its decision on June 30, 1976.

ARGUMENT

THE GOVERNMENT NEED NOT PROVE THAT STATEMENTS MADE WERE FALSE IN ORDER TO PROVE A SCHEME TO DEFRAUD

In the instant case, counsel for defendants Carity and Daniel Friedman made a motion to dismiss the indictment for failure to state an offense claiming that under the mail fraud statute the government must prove affirmative fraudulent representations and that ommissions will not violate the statute in themselves. The court denied that motion holding that:

> It is clear to the court that concealment of material facts which would make statements made even if literally true, misleading, is sufficient to violate the mail fraud statute. United States v. AMREP Corp., F. Supp. , 75 Cr. 1023 (June 30, 1976).

As far back at 1896, the Supreme Court considered and rejected the contention that the mail fraud statute only prohibited schemes to defraud based upon actual misrepresentations. In Durland v. United States, 161 U.S. 306, 313-14 (1896), the Court specifically rejected that argument holding that:

> It would strip it of value to confine it to such cases as disclose an actual misrepresentation as to some existing fact, and exclude those in which is only the allurement of a specious and glittering promise.

In McCarthy v. United States, 187 Fed. 117 (2d Cir. 1911), the defendants were convicted of devising a fraudulent scheme to sell worthless lots, which they described as in a "Park", and as if they were part of a well-established community. The Second Circuit relying on Durland, supra, affirmed the convictions and had no trouble finding the scheme fraudulent:

> Without containing an absolute misstatement as to any single fact, the whole description was carefully devised to lead prospective purchasers, resident some of them in distant states, to suppose that the 'Park' was practically an extension of the well-known 'Westhampton Beach', with its churches, schools, electric light, etc. and that it was a 'suburban district of Greater New York.' Id. at 118.

Accord, Lustigar v. United States, 386 F.2d 132, 138 (9th Cir.), cert. denied, 390 U.S. 951 (1968); Williams v. United States, 368 F.2d 972 (10th Cir. 1966), cert. denied, 386 U.S. 997 (1967); Blachly v. United States, 380 F.2d 665 (5th Cir. 1967); Linden v. United States, 254 F.2d 560, 568 (4th Cir. 1958); Silverman v. United States, 213 F.2d 405 (5th Cir.), cert. denied, 348 U.S. 828 (1954).

In the instant case the contentions and statements made at pages 8 and 9 of "This is My Land" (GX 384) were carefully devised to lead purchasers to believe that substantial profits could be made on an investment and resale of Rio Rancho land.

CONCLUSION

The Government need not prove that those representations were false in order for them to be part of a fraudulent scheme.

Dated: New York, New York

November 11, 1976

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

PATRICIA M. HYNES
ALAN R. KAUFMAN
MICHAEL S. DEVORKIN
JOHN KALEY
Assistant United States Attorneys
Of Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

-v- : 76 Cr. 644 (CMM)

AMREP CORPORATION, et al., :

Defendants. :

- - - - - - - - - - - - - - - - - - - -x

MEMORANDUM ON DEFENDANTS' KNOWLEDGE OF STATE DISCLAIMERS

At the pre-trial conference on October 29, 1976, the Court was asked to rule on whether the Government could prove that the defendants had been notified of various disclaimers issued by the States. The Government had premarked exhibits found in the corporate defendants' files which contained notices from different States including these disclaimers.

The Court stated:

> "I think he is entitled to a generalized statement which would represent the disclaimer appearing in the 35 statements. In other words, he doesn't have to say five States used this language, seven States used this language, ten States used this language.

> It seems to me that you can agree with him on a summary of the disclaimer and say disclaimers of this type appeared on the offering statements in 35 States, and he reads one." (Pre-trial Transcript 547-48).

In response to the Court's directive to reach an agreement, the parties have exchanged their proposed versions of the stipulation. Exhibit A attached hereto is the Government's proposed stipulation and Exhibit B is that proposed by Ms. Cross on behalf of the defendants. Since there is disagreement as to certain significant portions, the Government is submitting the matter for the Court's consideration and submits this memorandum in support of its position.

The Government's position is that it is entitled to summarize the actual disclaimers used by the States to place the defendants on notice of their responsibilities. We believe that our language most closely follows that of the disclaimers themselves and we have set forth pertinent disclaimer language below in support of that position.

The defendants apparently also desire a stipulation about the States' alleged verification of promotional facts and inspections of the property. However, this is not information contained within the State reports at issue; in fact, many States insist that any representations by the Company about State inspections are prohibited. Moreover, the Government cannot agree that the States independently verified the defendants' promotional facts because we do not believe that is true, nor do we believe there is any basis for concluding that the defendants were informed that the States were doing so. This is a matter for the defendants to prove as part of their good faith defense with live witnesses who can be cross-examined.

Invariably, t e corporation was informed that the filing with a particular State and subsequent authority to sell

> "does not constitute a recommendation or endorsement of the securities permitted to be issued, but is permissive only." (Calif. 1964. GX 501E).

This report was sent to Chester Carity. Similar language has been used by other States. For example, "the filing

[of this property report] does not constitute an endorsement of the property, and the ... State of Illinois has not, in any way, passed on the merits of the land being offered for sale or lease." (GX 501 I) (this was sent to Chester Carity);

"This permit [to sell land] is permissive only and does not constitute a recommendation or endorsement and in no sense is to be represented as an indication of the investment merit of such subdivided land. Any such representation is not to be relied on." (Kansas, GX 501 L).

Secondly, States notified the company that they had not passed upon the accuracy of the company's statements to the State or of the public report used by the company. For example, Michigan's property report stated:

> "Michigan State Property Report Disclaimer
>
> "This property report is for informational purposes only. The Michigan Department of Licensing and Regulation has neither approved nor disapproved the merits of this offering. The developer is responsible for the accuracy and completeness of statements contained herein." (GX 501 M).

Moreover, in its orders notifying Amrep of permission to sell in Michigan, the State told Amrep:

> "In authorizing the sale of said property within the boundaries of the State of Michigan, neither the State of Michigan nor the Department of Licensing and Regulation has undertaken to pass upon the worth or value of said property or to recommend its purchase, nor shall any developer, broker or salesman refer to the Department of Licensing and Regulation or to any official or employee thereof, in selling, offering for sale, or advertising or otherwise promoting the sale, mortgage, or lease of any such property, nor make any representations whatsoever that such property has been inspected or approved or otherwise passed upon by the said department or by any state official, department or employee."

(GX 501 N)

Minnesota's public report stated: "This report contains information submitted by the subdivider for the above subdivision, and the Commissioner has not verified the accuracy of this information." (GX 501 Z). Missouri's report stated: "These securities have not been approved or disapproved by the Securities Department of the State of Missouri. Nor has the Department passed on the accuracy or

adequacy of this prospectus. Any representation to the contrary is a criminal offense." (GX 501 DD).

In 1965, New Jersey, through Amrep's broker, informed Chester Carity that its "report is not an endorsement or an approval," and that "acceptance of such [promotional] material for filing does not constitute approval thereof;" "Certain erroneous statements and unsupportable claims may appear and certain facts may be omitted." (GX 501 EE). Later in 1971, New Jersey informed the corporation:

> "This public offering statement is for informational purposes only. The New Jersey Real Estate Commission has neither approved nor disapproved the merits of this offering. The subdivider and the broker are responsible for the accuracy and completeness of this report." (GX 501 HH).

The same exhibit notified the corporations that its broker was "personally responsible for the truthfulness and accuracy of the entire submission" to the State.

Finally, in addition to its stipulation, the Government will offer GX 778, a letter from the State of California to Chester Carity, wherein Carity is told:

"The advertising material, as amended, is not disapproved. The Commissioner does not have the facilities to investigate and determine if all the statements contained in advertising are true, correct, and fully reflect the existing facts. Necessarily this letter is forwarded under the assumption that the statements contained in the submitted advertising are true, correct, and fully reflect the existing facts."

Similarly, the Government will offer GX 777, a letter from Amrep's Ohio counsel to New York Counsel and Chester Carity, inter alia stating as to "Your Golden Future."

Page 12 - Items 82 and 83 - Comparisons between land and other forms of investment, such as bonds and annuities, are prohibited inasmuch as there is no comparability in terms of liquidity or other investment features.

The script is otherwise acceptable. The Division has directed me to advise you, however, that its approval of this advertising material does not relieve a licensee from its responsibilities for the truth of its statements or for possible misrepresentations under the Securities Act and in a securities sense. In short, the Division has asked me to reiterate its position that so long as foreign real estate is denominated a security it must, except where the application of the security analogy becomes obviously impossible, comply with the ground rules relative to the sale of securities.

Accordingly, we believe that the Government's proposed stipulation to summarize State disclaimers most accurately reflects the notice given the corporations and Mr. Carity. Its use will avoid introducing numerous documents which will unnecessarily expand the record.

CONCLUSION

The Government's stipulation on disclaimers should be used.

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

PATRICIA M. HYNES
ALAN R. KAUFMAN
MICHAEL S. DEVORKIN
JOHN F. KALEY
Assistant United States Attorneys

-Of Counsel-

MD:sr

Amrep Corporation was permitted to sell land in various states. Generally over the years, the state authorities notified Amrep Corporation and Ric Rancho Estates, Inc. that the filing of lots for sale with the State did not constitute an endorsement or recommendation of the property and that the State in no way passed upon the merits of the lots being offered for sale, nor could the company represent that the State had done so. Mr. Carity received notice of such provisions.

In some states the state required the Amrep Corporation and its sales representatives to give to purchasers a document called a public report. Generally over the years, Amrep Corporation and its sales representatives were also informed by these states that Amrep Corporation was responsible for the accuracy and completeness of the statements contained in such reports and for statements made to the state itself.

SSAPC

A 9560

In many states the sale of subdivided land is regulated by state agencies. In those states AMREP was required by law to file for permission to sell land within the state. In a number of states AMREP was required by law to file copies of all advertising used in the state with a state agency. In some states AMREP was required to give purchasers a document called a property report. In some of the states where AMREP was required to file its advertising and give out property reports, the state agency independently verified the accuracy of the facts contained in the advertising and property reports, including sending state inspectors to RRE to inspect the property. In other states, the state agency did not verify the accuracy of the statements made. Whether verified or not, the filings with the states and the permission given to sell land did not constitute a recommendation or an endorsement by the state of the merits of buying the property. Over the years AMREP Corporation and RRE were notified of the laws in the various states where they had permission to sell land.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-against-

AMROP CORPORATION, et al.,

Defendants.

- x

75 Cr. 102 (CHM)

METZNER, D. J.:

Defendants Howard W. Friedman and Henry L. Hoffman move to dismiss the indictment for denial of due process and for an examination of the grand jury minutes. It is claimed that the testimony of Leonard Geller before the grand jury was severely circumscribed, which amounted to withholding exculpatory evidence, and that the government failed to instruct the grand jury on applicable law. They also move to dismiss the indictment for vagueness, and to strike certain language as prejudicial and inflammatory surplussage.

Movants do not submit any affidavit by Geller to substantiate their claim. In fact, the government has submitted an affidavit by Geller's attorney which states that Geller was expected to tell the entire truth and that "in no respect was he to furnish any false, fabricated

or otherwise incorrect information . . . ." He was expected to be "wholly candid in his disclosures." Consequently, there is no basis for the court to examine the grand jury minutes. United States v. Cummings, 49 F.R.D. 160 (S.D.N.Y. 1969) (Mansfield, J.)

Movants also assert that the grand jury was improperly instructed on the applicable law which they claim absolves them of wrongdoing because of reliance on the supervisory authority of the various state and federal regulatory bodies. Movants' contention that the approvals of those bodies would require that the indictment be dismissed on due process grounds is clearly untenable.

The movants rely heavily on United States v. Pennsylvania Industrial Chemical Co. (PICCO), 411 U.S. 655 (1973) for the argument that the indictment must be dismissed. Their reliance is misplaced.

The approval of advertising and literature, especially when such an approval, as here, bore a clear legend that such approval did not constitute approval of the merits of the offering, does not amount to a bar to prosecution of false statements therein. The approval does not constitute an acceptance of the statements made as true.

While the approvals may be admissible in evidence as negativing knowledge of falsity or intent, they in no way require the dismissal of the indictment. There is an insufficient showing to require the court to review the entire grand jury minutes to evaluate just what information was imparted. United States v. Cummings, supra.

Next, movants request the indictment be dismissed for vagueness pursuant to Rule 7(c) of the Federal Rules of Criminal Procedure. This 42-page indictment is anything but vague. The government is charging them with a scheme or, if you will, a conspiracy, not with individual frauds. The scheme is set forth in great detail, stating specifically the items allegedly covered up, the false representations, the fraudulent omissions, the methods used to effectuate the alleged scheme on the public, and the jurisdictional acts required to bring the 80 counts within the scope of the statutes. The defendants are clearly apprised of the offenses with which they are charged, and that is all that is required.

The motions are denied.

So ordered.

Dated: New York, N. Y.
June 30, 1976

Charles H. Metzner
U. S. D. J.

A 9564

Miss Hynes

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-against-

[illegible] CONVENTION, INC. [illegible]
[illegible], Inc., [illegible] CORP.,
et al.,

Defendants.

- x

75 Civ. 2023
(CHT)

44829

A P P E A R A N C E S

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George C. Gallinis
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John F. Thompson
Of Counsel

J

METZNER, D. J.:

Defendant Amrep Corporation moves pursuant to Rule 14, Fed. R. Crim. P. to sever defendant Solomon Friend, its general counsel, based on a conflict between Friend's defense and the attorney-client privilege and the work product privilege of Amrep under the Fifth and Sixth Amendments.

This motion raises a difficult problem. Since 1970, Friend has been the general counsel to the corporation. As such, he has been involved in every aspect of its operations and its defense to the charges in this indictment, and the charges pending before the Federal Trade Commission (FTC). The FTC commenced its investigation in April 1973 and the grand jury commenced its investigation in March 1974. Friend severed the attorney-client relationship on January 28, 1975, when he was advised that he was a target of the grand jury investigation.

Friend claims that he was privy to the defense preparations in both investigations, and learned, in privileged communications, exculpatory information necessary to his own defense. There is no question that Friend would have the right to introduce in evidence such communications in his own defense in the criminal trial. Hearnbolder v. Empire Mine and Marine Insurance Company, 497 F.2d 1190 (2d Cir. 1974).

Communications between Friend and Amrep prior to the institution of the investigations may not be privileged since it is alleged that he was a participant with Amrep in criminal activity. If true, the privilege disappears on the trial. United States v. [illegible], 438 F.2d 488 (7th Cir. 1971); cert. denied, 401 U.S. 921, 922 (1974); United States v. Bob, 106 F.2d 37 (2d Cir.), cert. denied, 308 U.S. 589 (1939). Of course, a prima facie case must first be established against the parties. That point, however, will be reached at the close of the government's case and before Friend is called upon to present a defense.

On the other hand, if we were presented with a case in which only the work product of counsel in connection with the FTC and grand jury proceedings were involved, then the resolution would be equally clear. Work product receives broader application than attorney-client privilege, United States v. Nobles, 422 U.S. 225, 238 n.11 (1975), and is constitutionally based. In re Terkeltaub, 256 F. Supp. 6[illegible] (S.D.N.Y. 1966).

Terkeltaub presents the same underlying problem as in this case although the fact situation is completely different. Judge Bonsal pointed out that despite the breadth of the privilege, he would not categorically deny the government's right to compel testimony from defense

counsel before a grand jury as to whether counsel was present with his client during an alleged attempt to tamper with a witness after indictment of the client. On the facts of the case before him, Judge Frankel denied the government's application.

Turning then to the facts of this case, we have a lawyer-defendant who is charged with active participation with his client in a crime and who continues in the lawyer-client relationship after the governmental investigations are instituted. He had as much stake in the outcome of those proceedings as his client, and from all I can gather, their interests at the time were identical.

There is every indication at the present time that the trial will last for three months. Two long trials instead of one is not looked forward to with opportunity by a court faced with heavy calendars. On the other hand, a fair trial is more important than the interest of judicial economy.

The court has not been furnished with anything concrete to show prejudice justifying a severance. Only the bald proposition of "council of defense," or words to that effect has been urged by [illegible]. This, as Judge Frankel's analysis in Kahaluu, indicated, is not enough to grant a severance at the present writing.

The court perceives that only a small portion of the total evidence on the part of the defense might be included in privileged material. The resolution of the claim of work product can await the presentation of the issue on the trial. It may well be that prejudice may not arise at all if the defense is called upon to proceed. Of course, the government must understand that it might be met with a successful motion either by Kropp or Friend to be severed at that time, depending on the circumstances.

By letter to the court dated February 6, 1976, the corporate defendants expressed a wish to join in certain motions made by other defendants. There was a motion by Garity and Daniel Friedman to dismiss the indictment for grand jury impropriety with respect to the testimony of Solomon Friend. Although Garity and Friedman lacked standing to raise the question, the corporations who are the natural clients do not.

The affidavit on the Garity/Friedman motion sets forth two possible areas which covered privileged information: first, that grand jury witnesses were being debriefed by defense counsel, and second, that there was possible inaccuracy in a report of interrogation.

As to the question of debriefing, it would not appear that this could damage defendants. Debriefing is a part of the proceedings and always occurs where possible, and counsel would be lax if they failed to attempt to do so.

As to the question of the report, this was information already given to the grand jury by a non-privileged individual, and was not privileged in itself.

Motion denied.

So ordered.

Dated: New York, N. Y.
July 27, 1946

CHARLES M. METZNER
U. S. D. J.

A 9570

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA, :

-against- : S 76 Cr. 644 (CMM)

AMREP CORPORATION, et al., :

Defendants. :

- x

UNITED STATES OF AMERICA, :

-against- : 76 Cr. 1023 (CMM)

AMREP CORPORATION, et al., :

Defendants. :

- x

METZNER, D. J.:

Defendant Friend, by his motion filed August 3, 1976, seeks a reconsideration of this court's decision dated July 22, 1976, denying his motion for a severance in 75 Cr. 1023. The motion for reconsideration is denied.

Defendant also renews that motion, but addresses it to the superseding indictment, S 76 Cr. 644. This motion is denied for the reasons set forth in the opinion of July 22, 1976.

Finally, counsel for Friend seeks permission to withdraw as his counsel or, in the alternative, requests the court to grant a severance in the superseding indictment.

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This request for relief must be evaluated against events which occurred prior to the filing of the superseding indictment. On May 12, 1976, the government advised the court by letter that the law firm may be disqualified from representing Friend by reason of a conflict of interest. This was followed on May 27, 1976 by a six-page letter from the government strongly urging that the law firm would be violating Canon 5 of the Code of Professional Responsibility and disciplinary rules adopted thereunder if the firm persisted in representing Friend. On June 7, 1976, the law firm replied to the government's request. It took an equally strong position that the Code would not be violated in the trial of this action if it represented Friend.

Counsel stressed that it did not intend to call any member of the firm to testify, nor did it have any reason to believe that anyone else would call such a member. If such a member were to be called by some other defendant, the testimony would not be prejudicial to Friend.

Finally, counsel pointed to DR 5-101(B)(4) of the rules appended to the Code which permit a partner in a law firm to be retained as counsel even if it is possible that another lawyer in the firm may be called

upon to testify, if the refusal of retention would work a substantial hardship on the client. Counsel pointed out that he had been working on this case for 18 months and that "it would be patently and substantially prejudicial to deprive Mr. Friend of his chosen counsel at this date--particularly when the government has unjustifiably waited this long to raise this question."

Issue was thus joined for oral argument which occurred on June 22, 1976. It was clear after hearing argument that neither the Code nor the rules applied to the facts in this case. The firm represented defendant Amrep Corporation from 1961 to 1968. The representation was conducted by Winslow, a partner in the firm. The corporation was Winslow's "client" which he took with him, "and every scrap of paper," when he left in 1968 to join another firm. From 1968 until some time in the beginning of 1975, the law firm did not have any association with Amrep.

Defendant Friend was first employed as general counsel for Amrep in 1970. In 1975 he asked a partner in the law firm to represent him in the investigation which led up to this indictment. This partner never had any contact with Amrep up to that time. In lawyer parlance, he is a litigator, and has achieved a reputation of high competence in his specialty. The firm has

over 50 partners with untold numbers of associates. At the conference it was indicated that Winslow would be the only person now connected or previously connected with the law firm who possibly would be called as a witness on the trial.

Finally, it was obviously the position of Friend that there was no conflict of interest between him and counsel. Friend is an attorney of 28 years' standing at the bar, and it appears that he was intimately involved in the transactions complained of. He would be particularly sensitive to any possible conflict, yet he knowingly retained this attorney.

At the close of the argument, the government seemed to be backing off from the strong position it had taken in the correspondence. It suggested practical solutions to take care of any possible problem on the trial. While the court did not make any formal ruling on the original request, it was content to allow matters to proceed along the suggested practical solutions, assuming that even they were necessary.

I thoroughly agree with counsel that there was no prospective violation of the Code or rules requiring retirement from the case at that time.

On August 3, 1976, counsel filed the motion which we are now considering. Needless to say, the

court was shocked by the change of position. This case is a massive one. It has been under preparation by the government for several years. Indictment followed 20 months of presentation to two grand juries.

On November 18, 1975, three weeks after the filing of the indictment, a pretrial conference was held for the purpose of fixing time for motions and a trial date. The government represented it would be ready to start the trial in the beginning of April 1976, but subsequent events proved that this would have been impossible. When the date for the filing of defendants' motions had been set, the government requested March 15 or seven weeks just to answer the moving papers.

Over 100,000 pages of documents had been reviewed by the government in presenting the case to the grand jury. A parallel Federal Trade Commission investigation was going on, with open hearings to be held during the spring and early summer.

Six lawyers represented various defendants. They all urged that a huge amount of preparation was necessary before they could be ready for trial. They pointed out that if the trial was started in May or June, it would be necessary to tell the jury that it would be sitting the entire summer, since the indictment

posed a four-month trial. Under these circumstances, a tremendous amount of time would be used just to empanel a jury.

At the time this motion was filed, ten months had elapsed since the filing of the indictment, and the trial was scheduled for two months hence. On August 16, 1976, the government served a list of 377 witnesses whom it may call to testify.

At 5 o'clock yesterday afternoon, Friend's counsel delivered a letter to the court stating, among other things, that it would be unfair to require Friend to seek other counsel at this late date and that he would much prefer a severance.

I think that this letter puts everything in perspective. The sudden change in attitude by counsel at this late date must be found in the court's decision of July 22 denying Friend's motion for a severance. The severance is sought not only by Friend but by other defendants in the case. Counsel urges that now there is a valid reason for the severance to be found in the superseding indictment. The superseding indictment does not change the theory of the case or the proof that is going to be adduced. Counsel was pretty well aware of the general approach of the government when he argued on June 22.

Friend's affidavit states that his counsel has been informed by counsel representing other defendants that they intend to call as witnesses present members of the law firm to testify as to the nature and scope of the retainer during the seven-year period 1961 to 1968 that the law firm served as counsel for Amrep. From counsel's description to this court on the argument on June 22 of how Winslow held the client so close to his chest, I fail to see how anyone else knew what was going on, or could testify as to the nature and scope of the retainer. Secondly, such testimony could not create a conflict of interest. If it violated any canon of the Code, DR 5-101(B)(4), so strongly relied on by counsel in June, would easily create the exception against relief of counsel.

Furthermore, to suddenly ascertain on July 30, several days after the denial of the motion for severance that such witnesses would be called, is difficult to accept. All counsel had been active in this case for at least eight months prior to the June argument and certainly at that time would have known if such witnesses would have to be called. The "advice of counsel" defense was nothing new on June 22. All counsel sat there and made no objection to counsel's argument

or to the statements in the previous exchange of letters of which they had received copies.

I see no reason to relieve the law firm as counsel to Friend, nor do I see any reason to grant a severance. Nowhere in Friend's affidavit on this motion does he ever contend that the interest of the law firm may be in conflict with his interests. The fact that he may be "whipsawed" by tactics of co-defendants is always present in multidefendant cases. However, Friend knew or should have known all of this 18 months ago when he retained his counsel. He certainly knew of it five months ago when the government sent its first letter. Yet at that time he had no problems. I see no change in his situation on the eve of trial, nearly a year after indictment.

I must admit that I have difficulty understanding the government's position on the motion. Despite the easy solutions it suggested on June 22, it now is of the opinion that counsel should be relieved. On the other hand, it not only strongly opposes severance, but just as strongly opposes any adjournment to allow Friend to obtain new counsel.

The government obviously needed every bit of the year to prepare this case for trial. Adjournments have been sought to comply with court orders because of time pressures. Even when it was given nearly four months to supply a list of exhibits (and the time started in May, after the date it was supposed to have been ready for trial), the government wanted an extra day because of the intervening Labor Day weekend. How it could possibly expect Friend to retain new counsel who could be adequately prepared for trial in this case by October 5 is beyond understanding.

The motion is denied.

So ordered.

Dated: New York, N. Y.
September 17, 1970

Charles H. Tenney
U. S. D. J.

FILED
U.S. DISTRICT COURT
S.D. OF N.Y.
SEP 17 4 51 PM '76

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
-against-	:	S 76 Cr. 644 (CMM)
AMREP CORPORATION, et al.,	:	76-2486
Defendants.	:	
UNITED STATES OF AMERICA,	:	
-against-	:	75 Cr. 1023 (CMM)
AMREP CORPORATION, et al.,	:	45116
Defendants.	:	

METZNER, D. J.:

This motion filed August 6, 1976 seeks various types of relief. The first is a renewal of the previous motions made by defendant Friend to dismiss the original indictment. This relief is denied.

The motion also seeks to renew the original motion to sever defendant Friend. This branch of the motion is denied.

The motion also seeks to renew "all other motions heretofore made by said defendant" against the original indictment. This catchall unspecified request is denied.

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Finally, the motion seeks to make the original motions addressed to the original indictment now applicable to the superseding indictment. This relief is denied except that the separate motion by defendant Friend for a severance filed on August 3, 1976 addressed to the original and superseding indictment will be disposed of in connection with the August 3 motion.

Defendants Howard Friedman, Hoffman, Blum and Oberman have filed letters seeking to join in this motion by defendant Friend. The above determinations also apply to these defendants.

So ordered.

Dated: New York, N. Y.
September 17, 1976

Charles H. Tenney
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA, :

-against- : S.76 Cr. 644 (CMM)

AMREP CORPORATION, et al., :

Defendants. : #45304

- x

FILED
U.S. DISTRICT COURT
S.D. OF N.Y.
OCT 28 2 50 PM '76

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OCT 2 8 1976

METZNER, D. J.:

At a pretrial conference held on October 21, 1976, the court reviewed the objections made by defendants to the portions of the grand jury testimony of defendant Friend which the government seeks to read to the jury on its direct case.

The government relies on Federal Rules of Evidence 801(d)(2)(D) as authority for its right to read the designated portions.

There is no doubt that Friend was an agent of the corporation and under the rules would ordinarily be competent to testify in a manner to bind the corporation. I find this to be true whether or not he was subpoenaed to testify before the grand jury as an individual or as an agent of the corporation.

However, Judge Friendly, in Securities and Exchange Commission v. Geon, 531 F.2d 39, 43 n.3 (2d Cir.

1976), has pointed out that no matter how the new rule is interpreted, the existence of conflicting litigating positions between principal and agent at the time the agent was testifying before the grand jury would preclude the use of that testimony against the principal. The case of Dutton v. Evans, 400 U.S. 74 (1970), relied on by the government, is not in point in view of the reasons given for admitting the testimony in that case, which do not apply here. There remains the question, of course, as to what portions of the testimony which the government offers solely against defendant Friend are admissible on the ground that they are admissions by him.

There is also the Bruton problem as to statements that ordinarily would be admissible against defendant Friend, but which are inadmissible because of the prejudicial impact on codefendants on trial with Friend.

After reviewing all the testimony offered by the government, I find that the following portions are not admissible:

Appearances before the Grand Jury

July 24, 1975	p. 11	lines 12-20
	p. 13	" 4-11
	p. 33	" 16-21
	p. 49	" 2-23
	p. 52	" 13-19
July 29, 1975 P.M.	p. 41	" 6-25
	p. 42	" 2-25
	p. 43	" 2-17

Sept. 4, 1975	A.M.	p. 70 lines 12 through p. 78 line 22
Sept. 9, 1975	A.M.	p. 5 lines 18 through p. 6 line 9
Sept. 9, 1975	P.M.	p. 100 line 8 through p. 101 line 5 p. 118 lines 10-23
Sept. 11, 1975		p. 57 line 25 through p. 61 line 8 p. 72 lines 10-16 p. 77 lines 10-17 p. 81 lines 2-6 p. 82 lines 10-12 p. 83 lines 6-12 p. 84 lines 8-13
October 21, 1975	P.M.	p. 39 lines 19-22 p. 40 line 2 through p. 42 line 22

In connection with the portions of the testimony which the government may read, defendant Friend may read the following portions:

July 24, 1975		p. 14 lines 18-21 p. 15 lines 7-17
July 31, 1975	P.M.	p. 25 lines 19 through p. 26 line 13
Sept. 4, 1975	A.M.	p. 59 lines 18-20 p. 65 lines 17-25

So ordered.

Dated: New York, N. Y.
October 27, 1976

Charles L. Brieant
U. S. D. J.

A 9584

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA, :

-against- : S.76 Cr. 644 (CMM)

AMREP CORPORATION, et al., :

Defendants. :

- x

#45323

FILED
U.S. DISTRICT COURT
S.D. OF N.Y.
NOV 3 9 44 AM '76

METZNER, D. J.:

Defendant Solomon Friend again moves by this motion returnable October 21, 1976, and argued that day, for a severance.

The main thrust of the supportive argument is that counsel for Friend desires to refer to alleged privileged material in his opening statement to the jury. This court in denying the original motion referred to the fact that such material would not be referred to until after rulings by the court on motions for a judgment of acquittal at the end of the government's case. At that time it would be clear whether the government has made out a prima facie case of Friend's involvement in the alleged scheme.

The instant motion seeks to show that such material, in order to be effective for Friend, would have to be revealed at the beginning of the trial. Passing the possibility that Friend's opening could be reserved, and effectively so, until

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the opening of the defense, I proceed to the 13 examples of possible attorney-client privileged documents attached to the moving papers.

After reviewing those exhibits, I find that all of them except Exhibit E are not privileged. Since these appear to be the best examples from movant's point of view, I see no problem in permitting an opening in the nature anticipated by counsel. I should point out that Exhibit E is considered privileged since it involves a lawyer's response to a specific request of the client.

I should also point out that one of the difficulties in claiming attorney-client privilege rests on the fact that Friend, in addition to being an "inside" counsel, was also an officer and director of Amrep and involved in the business end of the operation. I might add that the business involved was the selling of lots.

I am sure that counsel can guide himself accordingly as to any other documents to which he will refer on opening. In those few cases in which he might have doubts, the court will make rulings if the questioned material is submitted the night before the scheduled opening.

It has also been urged that Friend will be the victim of "spill over" and "rub off" in the government's proof as to the existence of a scheme and the participants therein. Reference is made to the case of United States v. Kelly,

349 F.2d 720 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966). However, the claim of tangential or minor involvement really cannot be ascertained solely on Friend's assertion. It will have to await resolution until the end of the government's case at which time Friend, if so advised, may renew the motion for severance.

So ordered.

Dated: New York, N. Y.
November 1 , 1976

Charles H. Tenney
U. S. D. J.

DEC 30 3 32 PM '76
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA, :

-against- : S 76 Cr. 644

AMREP CORPORATION, et al., :

Defendants. : #45486

- x

METZNER, D. J.:

At the conclusion of the arguments by the various defendants for the direction of judgments of acquittal, the court disposed of all the motions except the one made by defendant Solomon Friend requesting a judgment of acquittal or, in the alternative, a severance.

The taking of evidence started on November 8, 1976 and continued through December 28, 1976. Over 6,000 pages of transcript have been recorded from 43 witnesses, in addition to the admission in evidence of over 400 exhibits, including motion pictures, brochures and the like. There is no doubt in the court's mind that under the facts and law as set forth in United States v. Kelly, 349 F.2d 720 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966), defendant Friend is in the same position as defendant Shuck was in the Kelly case. Consequently, the motion of defendant Friend for a severance would have had to be granted.

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After a careful review of all the evidence, and listening to the arguments of counsel, the court has concluded that the indictment against defendant Friend must be dismissed. There is some evidence from which a jury could infer that Friend was aware of the existence of a scheme. However, there is so much to show that even if this were true, his actions were devoted to avoidance of any violation of law. Peculiarly enough, the government takes the position that Friend was a participant in the scheme, while seeking to draw the inference that because of his advice as general counsel in endeavoring to comply with the law, the jury should infer that the prior course of dealings was in violation of the law.

The exculpatory material offered by the government, as far as defendant Friend is concerned, at most may show knowledge of the existence of a scheme. However, that is a far cry from proving participation in the scheme. On all of the evidence produced, the court has come to the conclusion that a reasonable jury could not find Friend guilty beyond a reasonable doubt of knowing participation in a scheme.

So ordered.

Dated: New York, N. Y.
December 30, 1976

Charles H. Metzner
U. S. D. J.

A 9589 Docket 2693

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA :

- v - : 75 Cr. 1023 (CMM)

AMREP CORPORATION, :
RIO RANCHO ESTATES, INC.,
ATC REALTY CORPORATION, :
HOWARD W. FRIEDMAN,
CHESTER CARITY, :
IRVING W. BLUM,
HENRY L. HOFFMAN, :
LIBMAN B. OBERMAN,
SOLOMON H. FRIEND, :
and DANIEL FRIEDMAN,

Defendants. :

- -x

GOVERNMENT'S TRIAL BRIEF

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

PATRICIA M. HYNES
ALAN R. KAUFMAN
MICHAEL S. DEVORKIN
JOHN F. KALEY
Assistant United States Attorneys

- Of Counsel -

* * *

The Scheme

The Government expects to prove defendants' scheme to defraud and to obtain money from investors involved the purchase of 91,000 acres, 142 square miles, of semi-arid desert grazing land for approximately $180 per acre, the subdivision of the land into approximately 86,000 lots and the offering of the lots for sale as sound profitable financial investments, which were increasing in resale market value and which could be resold at substantial profits. The prices charged for the lots were alleged to include water, utilities and other customary amenities such as paved roads. The 86,000 lots were designated as either "homesites," which were generally one half acre, although some were larger, "commercial" and "multi-dwelling" lots which were smaller than a half-acre and "ranchettes" which

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were generally three to five acres in size. The prices for "homesite" lots recently ranged from $6,200 to $11,800 per acre, and the "commercial" and "multi-dwelling lots" recently ranged in price from $3,150 to in excess of $25,000 per lot. In fact, the Government will show that the defendants had no intention of improving the lots they sold to investors with water, utilities and paved roads, and had not improved these lots in the 15 years they were selling this land as a sound, profitable financial investment. The defendants paid $17,850,000 for the land and realized $170 million from the sale of over 77,000 unimproved lots to more than 45,000 purchasers from 37 states. Defendants would have realized in excess of $200 million if all 86,000 unimproved lots were sold.

A principal feature of defendants' scheme was the use of high pressure and deceptive sales techniques. The Government's proof will show that defendants' sales techniques were designed to pressure the persons to be defrauded, almost all of whom lived outside of New Mexico, immediately to sign contracts to purchase lots. The lots were sold on the basis of representations designed to mislead the victims into believing, among other things, that (a) the purchase of Rio Rancho lots was a unique investment opportunity made possible by a "low mark-up policy"; (b) the lots were safe and secure financial investments which were appreciating rapidly and significantly in resale market value and could be resold at a substantial profit; (c) the lots sold and

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offered for sale to investors were being developed and improved with water, utilities and paved roads and thus enhancing there resale value; (d) there was a scarcity of land for development in and around Albuquerque, and the city of Albuquerque was "bursting at the seams" and could only grow to and through Rio Pancho Estates, thus creating a demand for these lots and a profitable resale market for these allegedly improved lots. The Government claims all of these pretenses, representations and promises were false, fraudulent and misleading, and defendants knew they were.

The "Exchange Privilege"

Another integral part of defendants' scheme was the development of small company-owned building areas which were used to create the false impression that defendants were gradually developing all of the 91,000 acres of Pio Rancho Estates as they represented would be done.

The proof will show that the defendants knew that only a small per cent of the purchasers would actually move to Rio Rancho. For that small per cent of purchasers, which the defendants believed to be five per cent, who would actually move to Rio Rancho the defendants set up a so-called "exchange privilege". The "exchange privilege" was set up so that only a single half-acre "homesite" lot, but not a "commercial" or "multi-dwelling" lot or "ranchette," could be exchanged for an improved lot in the company-owned "building area". If the person who wanted to build owned more than one "homesite" lot, he had to hold on to those additional lots.

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The Government's proof will show that even for someone who bought land because he wanted to move to Rio Rancho, if he bought more than one "homesite" lot, he had to hold on to those additional lots because the "exchange privilege" only permitted him to exchange one unimproved "homesite" lot for an improved lot in the "building area" on which to build his home. Therefore, anyone who bought more than one "homesite" lot bought lots for investment and resale, whether they realized it or not.

The Government will also prove that when a purchaser of a "homesite" lot exercised this so-called "exchange privilege" he usually had to pay more money for an improved lot in the building area, as much as $1500 or more and usually ended up with a smaller piece of land, usually a quarter of an acre. In short, the "exchange privilege" usually ended up with a one-half acre lot being traded for a

one-quarter acre lot plus an additional payment of $1500. This was true, as the Government will prove, even if the purchaser had paid in thousands of dollars on additional land.

Moreover, the Government will prove that a purchaser of a "commercial" lot or a "multi-dwelling" lot or a "ranchette" had no "exchange privilege". Those purchasers could not get an improved lot in the company-owned building area which were the only areas that had utilities. The purchase contracts for commercial and multi-dwelling lots and ranchettes did not provide for a right to exchange for a lot with utilities.

The Government's proof will show that the "commercial", and "multi-dwelling" lots and "ranchettes" were the most expensive lots sold, with commercial lots recently selling for as much as $25,000 a lot and more. In addition, it was company policy that a purchaser had to buy a minimum of two commercial lots.

There can be no serious dispute that purchasers of commercial and multi-dwelling lots bought those lots as a financial investment based upon representations that those lots would be surrounded by development and that retail commercial establishments and multi-family dwellings could be put on these lots which would be income producing, or

that the lots could be resold at substantial profits for that purpose.

The Government's proof will show that it is, and has always been, the defendants' intention to put utilities only in "core" building areas owned by the company, and to provide a lot with utilities in the company-owned core area for the small per cent of purchasers who wanted to build a home at Rio Rancho.

The Government's proof will also show that these commercial and multi-dwelling lots and ranchettes are, in most cases, miles from utilities and defendants have no contractual obligation to provide utilities to these lots although the exorbitant prices charged for these lots were represented to include utilities.

Moreover, the Government will prove that (1) it would not be economically feasible for purchasers of these commercial and multi-dwelling lots and ranchettes to themselves to extend utilities to their lots, and (2) with respect to the commercial and multi-dwelling lots, there would be no reason to extend utilities to these lots because the small per cent of purchasers of "homesites" who move to Rio Rancho will, of necessity, be situated in the small company-owned core areas which have utilities, and these commercial and multi-dwelling lots are, for the most part, miles from these core areas, and therefore will not be

surrounded by the development which would require, justify or support commercial retail establishments and multi-family units.

In sum, the Government's proof will show that the commercial and multi-dwelling lots and "ranchettes" are now desert lots, improved only by dirt roads, miles from utilities, and do not carry with them any right of exchange for a lot with utilities in the company-owned building areas, and therefore these commercial and multi-dwelling lots and ranchettes cannot be used for the intended purpose for which they were sold. Nor for that matter can "homesites" be used for the purpose intended; that is, as a "homesite" because they are also without utilities. In 15 years not one of these "homesites" have been build upon. At best, a single "homesite" lot can be used to exchange for a lot with utilities in the building area provided a lot in the building area is available. As is discussed more fully below, there is not enough land set aside in the company-owned building areas to allow each "homesite" which has been sold under these contracts to be exchanged for a lot with utilities in the building area. So while the contract for a "homesite" lot carries with it a so-called "exchange privilege", there is not enough land set aside in company-owned building areas to enable these defendants to exchange each lot if they were called upon to do so. It is much like a Ponzi scheme. The

first in will get a lot but there simply are not enough lots for everyone, and defendants knew this. The fact that defendants have not defaulted to date is of course beside the point.

This is also like an "advance fee" scheme because defendants charged in advance for utilities for each lot they sold, whether "homesite", "commercial", "multi-dwelling" or "ranchette", knowing they were not obligating themselves and would not deliver utilities to commercial, multi-dwelling and ranchettes, and knowing they could not deliver utilities under the "exchange privilege" for all the "homesites" they sold.

The Government does not contend or charge that if someone bought one homesite lot and actually moved or actually will move to Rio Rancho Estates they were defrauded, unless of course there is no lot in the building area available for them to exercise their exchange privilege. The class of defrauded victims is carefully defined in the indictment as "investors and potential investors" in lots at Rio Rancho Estates. (Indictment, para 11, p.3).

The proof will show that defendants knew and believed that 25% of the purchasers think they might move but only 5% actually do relocate. The proof will also show that some purchasers bought lots thinking perhaps they would move, but even if they didn't move they believed that they had a good financial investment which they could resell at a profit if they decided not to move.

The evidence will show that the alleged value of these lots as a financial investment was the essential inducement for the purchase of lots even for people who toyed with the idea of moving. Without the representations as to the value of these lots as financial investments, purchasers would not have committed themselves at these sales dinners to purchase these lots. It is obvious that after a sales dinner lasting approximately two hours people were not convinced that they should move lock, stock and barrel to Rio Rancho Estates. There had to be some other reason to buy this land, and there was. The reason given was the value of these lots as safe, sound and profitable financial investments, which could be resold at a profit even if you didn't decide to move to Rio Rancho Estates. The Government's proof will show that the essential inducement to buy this land was its value as a financial investment which could be resold at a profit. It was also touted as a nice place to live. A reason which might entice you to move but also

a reason why it was a good investment and why the lots could be resold at a profit.

Every effort was made to sell people as much land as possible, even those who might want to move there, notwithstanding the fact that only one "homesite" lot could be exchanged for a lot in the building area which had utilities. Therefore, anyone who bought more than one "homesite" lot, even if they expected to move, had to hold on to the additional lots for investment and possible resale.

The Government does not charge or contend that there isn't a real community at Rio Rancho, contrary to defense counsels' opening statements. There is and the Government's evidence will show that there is indeed a community at Rio Rancho. The Government's proof will also show that after 15 years there is a community which comprises less than 2% of the total acreage. The Government's proof will establish that these defendants did not intend to develop the entire 91,000 acres as promised and did not believe, and had no reasonable basis to believe, that the entire 91,000 could or would be developed.

The evidence will show that these defendants only intended to place utilities in small company-owned building areas based upon demand as houses were built. The Government will prove that the defendants knew and believed, contrary

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to what they represented to prospective investors, that the demand for lots on which to build houses would be very limited in relation to the entire 91,000 acres, because 1) only 5% of the purchasers who bought homesites would actually move to Rio Rancho, and 2) the growth of Albuquerque would not require the absorption of these lots or result in a demand for these lots. Indeed Mr. Friend testified in the Grand Jury that it would take until the year 2150 just for the company-owned building areas to be developed!*

The Government's proof will show that the community that does exist at Rio Rancho today is primarly made up of homesite purchasers who have relocated. These are part of the 5% of purchasers that the defendants always expected and counted on moving to Rio Rancho. Today Rio Rancho is composed of approximately 1500 single family homes, only 90 of which were purchased by Albuquerque residents and of those Albuquerque residents, many are employees of Rio Rancho. Of the approximately 77,000 lots sold, Mr. Friend testified in the Grand Jury that 1368 homesite lots have been exchanged for a lot in the company owned building area. In other words less that 2% of the lots sold have been exchanged for a lot in the building area.

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* The proof will show, and Mr. Glendon, counsel for Friend conceded in his opening statement, that Mr. Firend supervised the building operations at Rio Rancho.

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The defendants make much of this "privilege" of allowing a "homesite" purchaser to exchange one lot for a lot with utilities when they are ready to build. But as the proof at trial will show only a small percent of purchasers bought to build and there weren't enough lots set aside to exchange each homesite lot sold. Moreover, there is no exchange privilege for commercial and multi-dwelling lots and ranchettes.

The kind of evidence to convict for an illegal scheme and artifice such as that charged in this case can be broken down into several categories.

1. General Observations On Misrepresentations and Omissions As To Material Facts

To begin with, the Government does not have to prove that the defendants' scheme to defraud under the Mail Fraud Statute or the Land Sales Full Disclosure Act consisted of actual misrepresentations.

As far back at 1896, the Supreme Court considered and rejected the contention that the mail fraud statute only prohibited schemes to defraud based upon actual misrepresentations. In Durland v. United States, 161 U.S. 306, 313-14 (1896), the Court specifically rejected that argument holding that:

A 9602

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-against- : S 76 Cr. 644 (CAM)

AMREP CORPORATION, et al., :

Defendants. :

- x

MOTZNER, D. J.:

The motion to strike counts, allegations and portions of paragraphs in the superseding indictment made by Mrs. Thompson on December 29, 1976, is disposed of as follows:

Counts 67, 28, 44, 61, 64, 7, 22, 29, 21, 23, 25, 26, 71, 72, 73 and 75 are denied.

Counts 74, 76, 77, 78 and 80 are dismissed.

The motion to strike allegations 16(v), 17(c), 17(i), 17(p)(vi), 17(r)(i), and 17(s)(viii) is denied.

The motion is granted as to allegations 17(f), 17(n) from "fearful" on line 2 to "investment" on line 5, 17(o), 17(p)(xii), 17(q)(vi), 17(s)(vii) and 17(s)(x).

The motion to strike portions of paragraphs 12, line 4, 13, lines 5 and 6, 14 beginning with line 13, 15 beginning with line 8, 15 beginning with line 13, 16, line 9, 17(a), line 4, 17(j) beginning with line 6,

DEC 30 '76 MICROFILM

17(k) beginning with line 4, 17(l)(i) beginning with line 7, 17(m) beginning with line 4, and 17(p) beginning with line 4 is denied.

The motion is granted as to paragraphs 17(h), beginning with line 3, and 17(s)(ix) beginning with line 3.

So ordered.

Dated: New York, N. Y.
December 30, 1976

Charles M. Metzner
U. S. D. J.

A 9604

JACOBS PERSINGER & PARKER
70 PINE STREET
NEW YORK, N.Y. 10005

CABLE ADDRESS: JAPERPAR

(212) 344-1866

TELEX: 12-9161

March 3, 1977

Hon. Charles M. Metzner
United States District Judge
United States District Court for the
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Dear Judge Metzner:

I was a partner at Royall, Koegel & Rogers (now Rogers & Wells) from 1962 to early 1968, when I joined Jacobs Persinger & Parker. You are aware, I know, that AMREP Corporation was a client of the Royall, Koegel firm and now is a client of my present firm. I have been the partner in charge of the client at both firms.

I write this letter with the hope that I may add some relevant information for your consideration in arriving at just sentences in this case. Particularly, I wish to urge that in fairness the punishment of the individual defendants should be measured against a unique background, of which I have some considerable familiarity.

To my personal knowledge, Henry Hoffman, Chester Carity, and Howard Friedman* all were actively involved in the decision to acquire and develop the land which became Rio Rancho Estates. I can recall their excitement in being able to buy the property, since they were absolutely persuaded that Albuquerque, which had doubled in size from 1950 to 1960, would continue its rapid growth and that Rio Rancho inevitably

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* As you know, Daniel Friedman did not join the Company until 1967.

would share in that growth. To them it was clear that they had the opportunity to create a vigorous new community, and their energies from then up to the present have in substantial part been devoted to doing just that.

Article 9-A of the New York Real Property Law regulates the sale of subdivided lots in New York. Under my supervision my firms handled all filings under Article 9-A from the time it was amended in 1963 to require an Offering Statement until 1971. My firm thus reviewed the Rio Rancho advertising in 1963, and I can recall that I expressly questioned either Mr. Carity or Mr. Hoffman concerning statements in advertisements regarding the growth of Albuquerque to the northwest, and that they assured me the City just had to grow to the northwest because of peculiarities in the topography and ownership of the surrounding land. It was absolutely clear to me that they sincerely believed this to be a fact.

I am informed that at the trial the last sentence of the below-quoted paragraph from the Company's April 10, 1962 Prospectus was used to throw doubt on the bona fides of the defendants' beliefs concerning the growth of Albuquerque:

> "The basis for the Company's interest in this property is that Albuquerque has experienced rapid growth in recent years; according to data published by the United States Bureau of the Census, its population has grown from 97,000 in 1950 to 201,000 in 1960, while the population of Metropolitan Albuquerque has grown from 146,000 to 262,000 during the same 10-year period. In recent years numerous homes have been erected between Albuquerque and the property. A large development of medium and higher priced homes presently is being erected in the area between the City and the property, and the northern line of such development adjoins the property on the south for approximately six miles. The Company does not, of course, know what growth, if any, Albuquerque will experience in the future, or if any such growth will benefit the Company" (underscoring added).

The purpose of the foregoing paragraph was to explain to potential purchasers of the securities offered

by the prospectus the basis for the Company's interest in the Rio Rancho property. An explanation was necessary since at the time of the offering the Company's total assets were approximately $12,000,000 and the purchase price for Rio Rancho was $9,800,000. The underscored sentence was a "lawyer's" statement written by me. At the time it was written Messrs. Carity, Hoffman and Howard Friedman strongly objected to it because they said it was not accurate, - they fervently believed that Albuquerque would continue to grow rapidly and that its growth would benefit the Company. However, I believed that, without the sentence, the paragraph could be read as guaranteeing the future profitability of the Company, and careful counsel never permits a prospectus to contain any such representation. Hence my insistence that the sentence be used in order to negate actual knowledge of the future, as distinct from belief.

The defendants' belief in the future of Rio Rancho permeated their actions. As counsel, I attended almost all meetings of the Board of Directors and met with the various defendants many, many times, and they never said anything to me, ever, which suggested anything except a sincere intention to develop Rio Rancho Estates and a strong belief in its future as a community.

The defendants were very conscious that management of a publicly owned corporation had a duty to conduct the Company's business in a completely legal manner. The defendants thus utilized, indeed reached out for, legal advice for every aspect of their business. They consulted with me extensively, and I can categorically state that never did they seek advice aimed at cutting corners. On the contrary, the frequency of their consultations with me could only lead to the conclusion that they intended to stay well within the bounds of legal propriety. When counsel in other states were required (as they frequently were), I generally was requested to obtain that counsel; and without exception I obtained counsel whom I believed to be thoroughly reputable and competent. In addition to outside counsel, the defendants employed in-house counsel for the express purpose of insuring compliance with the myriad laws and rules of its heavily regulated business.*

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* In addition to Federal regulation, many states in which Rio Rancho lots were sold regulated their sale.

Of equal importance is the fact that these defendants operated a business whose every facet was at least tacitly, and in some respects overtly, approved by government authorities. For example, the New York Department of State repeatedly inspected Rio Rancho and measured its advertising claims against the first-hand knowledge thus acquired. Department inspectors spot-checked its dinner parties and certainly were aware of the content of the podium speeches and salesmen's presentations. Yet, far from suggesting that the Company was doing anything wrong, the Department continued to clear for use the various advertising materials and to accept filings for additional portions of Rio Rancho as they were platted.

Paragraph (e) of §135.17 of the Department Regulations provides as follows:

> "(e) In reviewing the advertising of promotional material the Department of State will determine whether the same is in violation of article 9-A of the Real Property Law and the applicable sections of this Part by examining form, language and content of the material, as supported by the record and other information available to it."

Every piece of written advertising and every film distributed in New York was submitted to the Department of State, and I know from personal experience that the Department personnal reviewed the material as required by the Regulations. I know of numerous instances in which they insisted on changes in the wording of advertisements as a condition to permitting their use. These officials were conscientious, thorough and honest, and by their words and actions reaffirmed the belief of the lawyers and these defendants that their business was being conducted in a completely lawful manner.

I cite these facts not to dilute responsibilities or blame others, but I do think them relevant for your consideration in assessing the "criminal intent" and the appropriate punishment. I cannot believe that businessmen who so extensively employed lawyers in an effort to comply with the law and who were subject to close government

scrutiny can be deemed to have possessed the kind of criminal intent which would warrant imposition of a jail sentence. The stigma of conviction and the ruin of their business and careers is, I believe, punishment enough under these most unusual circumstances.

Respectfully,

Edward B. Winslow

Edward B. Winslow

- Docket

A 9608 A 26473

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
-v-	:	S. 76 Cr. 644 (CMM)
AMREP CORPORATION, RIO RANCHO ESTATES, INC. ATC REALTY CORPORATION, HOWARD W. FRIEDMAN, CHESTER CARITY, HENRY L. HOFFMAN and DANIEL FRIEDMAN,	:	
Defendants.	:	

CARITY AND DANIEL FRIEDMAN MEMORANDUM
IN SUPPORT OF POST-TRIAL MOTIONS

This memorandum is submitted in support of Carity's and Daniel Friedman's motion for a judgment of acquittal pursuant to Rule 29(c), Fed. R. Crim. P., or in the alternative, for a new trial pursuant to Rule 33, Fed. R. Crim. P. This memorandum incorporates and adopts the memorandum filed by Mr. Arkin's firm. It is our understanding that the contents of this memorandum also are adopted by Mr. Arkin's firm on behalf of the defendants Howard W. Friedman and Henry L. Hoffman, and by counsel for AMREP and the other corporations insofar as applicable.

POINT I

THE INDIVIDUAL DEFENDANTS AND AMREP ARE ENTITLED TO A NEW TRIAL BY REASON OF THEIR PREJUDICIAL JOINDER TO THE CORPORATE DEFENDANTS ATC AND RIO RANCHO ESTATES, INC.

The individual defendants moved for a severance from the trial of the corporations prior to the trial. The basis for the motion was that a substantial majority of the evidence to be received at the trial would be connected with the corporations only, and that joint trial with the corporations therefore would materially prejudice the individuals in violation of Rule 14, Fed. R. Crim. P. The motion for a severance was repeated orally immediately prior to trial after issuance of the opinion of the Court of Appeals on the mandamus.

The prediction made in the pre-trial motions was proved to be true at the trial. A substantial majority of the evidence in fact was connected only to the defendant ATC or the defendant Rio Rancho or to various non-defendant brokers who sold Rio Rancho land. The joint trial therefore prejudiced the right of the individual defendants' - - and AMREP - - to a fair trial.

A. Theory of the Prosecution's Case as Tried

Commonality is the essence of a scheme to defraud. Proof of a scheme to defraud requires evidence of a common plan involving the defendants on trial. The prosecution must establish a plan or pattern in the defendant's allegedly criminal conduct. United States v. Nance, 502 F.2d 615 (8th Cir.). cert. denied, 420 U.S. 992 (1974); Fabian v. United States, 358 F.2d 187, 193 (8th Cir.), cert. denied, 385 U.S. 821 (1966); cf. United States v. Ross, 321 F.2d 61, 68 (2d Cir.), cert. denied, 375 U.S. 894 (1963). Without a common plan, there is no "scheme." The government cannot build its case, or establish a scheme, by evidence of a string of unrelated and diverse swindles. In Bliss v. United States, 354 F.2d 456, 457 (8th Cir. 1966), then Circuit Judge Blackmun, in upholding a mail fraud conviction, stated:

> "One must recognize, as the defense asserts, that it has been said that a mere succession of unrelated and diverse swindles, even though they possess 'a common stage', is not within the reach of the mail fraud statute. McLendon v. United States, 2 F.2d 660, 661 (6th Cir. 1924); Dyhre v. Hudspeth, 106 F.2d 286, 288 (10th Cir. 1939)."

The indictment in this case was sweeping and prolix. During the trial however, it became apparent that the prosecution would be unable to connect the various

defendants with the indictment's many allegations. For the purpose of connecting each of the defendants with a common scheme, the prosecution therefore limited the parameters of its case to the allegation that the defendants, in common, sold or authorized the sale of land through the use of two alleged misrepresentations: - (a) that Rio rancho land was a good financial investment, and (b) that Albuquerque could only grow to the northwest to and through Rio Rancho.

Evidence of this conscious limitation of the common scheme runs through the record. Unwilling to rely for conviction on the common company authorized literature, the prosecution, for example, connected the dinner party scripts to the various defendants with evidence and representations (a) that the scripts were the same in these particular respects, (b) that the scripts issued from AMREP, (c) that no deviation was allowed from the scripts, and (d) that the various defendants either read a script or attended at least one dinner party.

Howard Friedman's case serves as an example. The only evidence connecting Howard Friedman to the scripts was that he had attended one dinner party. Since there was no direct evidence of what was said at that party, or at any party the other individuals may have attended, the only evidence which connected Howard Friedman to the representations in the scripts was the evidence that all the scripts were essentially the same, and that AMREP

allowed no deviation therefrom. Thus, inferentially, Howard Friedman could be found to have known - - because he heard them - - that the two common representations were being made.

This prosecution theory of proof served two of its purposes. It connected these common representations to any individual defendant who had either read one script or attended one dinner party. And it also connected these common representations to every purchaser. But, at the same time, this theory of proof clearly limited the scope of the common scheme charged against all of the defendants.

The case was tried precisely on this theory of commonality. Time and again the prosecution, in response to Court inquiry, repeated its representation that the material portions of the dinner party presentations were the same (See e.g. Tr. 713-714, 732, 734, 1265-1266, 1459, 1777, 1789-1791, 1819, 2448-2449, 2544-2545, 3229-3233, 4362, 4372-4374). In doing so, the prosecution defeind the common scheme which it sought to prove, which, in toto, consisted of the common oral representations set forth above, plus the common AMREP approved literature.

The case was submitted to the jury on precisely this limited theory, without objection by the prosecution. The Court charged (Tr. 7814):

> "The scheme to defraud in this case is alleged to have been that the defendants made a false claim as to the investment value of the purchase of land at Rio Rancho and made a false claim as to the direction and extent of growth of Albuquerque knowing the claims to be false."

Having chosen, for its own benefit, to rely upon the two representations as constituting the common scheme among all defendants, it is clear that the massive other evidence of uncommon conduct and representations was not admissible to establish a common scheme, but could only have been offered and received on the question of intent. But evidence of intent, if it is to be probative of any single defendant's guilt, must be connected to that defendant. Otherwise it is meaningless as proof as to that defendant, is inadmissible as to that defendant, and, if received only because it is connected with another defendant, e.g., ATC, creates substantial questions of potentially prejudicial joinder.

Criminal intent, or mens rea, is personal. It may not be imputed to an individual. It must be connected to a defendant or it is inadmissible as to that defendant. Without evidence of personal knowledge, individual intent may not be inferred. See, Direct Sales Co v. United States, 319 U.S. 703, 711 (1943); Ingram v. United States, 360 U.S. 672 (1959). In the Direct Sales case, the Court said, Id., 319 U.S. at 711:

> "Without the knowledge, the intent cannot exist. Furthermore, to establish intent, the evidence of knowledge must be clear, not equivocal."

A substantial and, we believe, a majority of the evidence in this case was not connected to AMREP or the individual defendants. For example, while there was evidence that Geller, Miller and Monaco of ATC did authorize representations as to resale, and while it might therefore be found that the defendant ATC was connected with those representations, there is no evidence connecting AMREP or the individual defendants with such representations. Mandel, Zaknich, and Perlmutter, all of AMREP and all prosecution witnesses, denied either authorization or knowledge of such representations (Tr. 792-793, 932, 1133, 3424-3425, 3522). Those representations, upon which the jury concentrated on its next-to-last note to the Court, were not admissible against AMREP or the individual defendants on the crucial mens rea issue - yet, clearly, they were prejudicial.

Again, for example, witnesses testified that tours at Rio Rancho were driven from the airport to Rio Rancho on the east side of the Rio Grande in order to avoid a view of the vacant land on the west mesa. They testified also that ATC tours were treated specially, that ATC kept the members of their tours isolated and segregated from anything that might affect the solidification of

prior purchases, that newspapers containing adverse publicity were destroyed, and that pilots were warned not to point out Rio Rancho as the tour plane descended to land. Absent evidence that AMREP and the individual defendants knew of these activities at Rio Rancho on the part of ATC tour guides, the evidence was unconnected and of substantial prejudice.

Substantial other evidence of a similar nature also was received against ATC and Rio Rancho which was never connected with the individual defendants or with AMREP. An Index of that evidence is attached hereto and Exh. A. This evidence was never connected to the individual defendants. Its prejudice is apparent from a reading of the Index.

Massive unconnected evidence was received at this joint trial which could not have been received at a separate trial of the individual defendants or of AMREP itself. Under the principles of United States v. Branker, 395 F.2d 881, 888-889 (2d Cir. 1968), a new trial is required for the individual defendants and for AMREP. This result is necessary especially in view of the prosecution's deliberate choice in this case. Certainly it was forewarned of the consequences of its approach to the trial. Thus, while this Court denied our oral motion for severance immediately prior to the commencement of the trial, it specifically said (Tr.9):

> "There may be an accumulation at the end of the government's case and you can say that the government was so anxious to get you that they severed you out of the case and this is their problem. I have said this five times if I have said it once. They may end up with a couple of corporations in there, but that is their problem."

On the now completed record, it is clear that the prosecution deliberately introduced the evidence in question knowing that it lacked proof to connect this evidence to AMREP and the individual defendants. Indeed, it seems clear that the prosecution in fact was rolling dice in the hope or expectation that Geller, before the prosecution rested, would, to save himself, connect his ATC activity upstream to AMREP and the individual defendants.* As Judge Hays said in United States v. Branker, 395 F.2d at 889;

> "Since the testimony of Mrs. Neely provided no surprises, counsel for the government must surely have known in advance of trial that the chances of proving the conspiracy charged in the indictment were very slim. Yet the conspiracy count provided the only justification for the joinder of the eight defendants. If the prejudice of joint trial is to be eliminated without the waste of time and energy which results from a joinder which is declared improper in the midst of trial, or, as here, on appeal, we must rely on the responsibility and good judgment of the prosecutors."

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* At Geller's recent sentencing, the prosecution argued that Geller had breached his plea bargain by failing to implicate our individual defendants in his ATC activity.

A new trial is required also because of the prejudicial joinder of Oberman and Fri . Again, the prosecution proceeded with a clear awareness of its peril. The evidence against Oberman and Friend was really non-existent. Yet both were joined for trial, and, as a result, Oberman's alleged declaration of only a 5% development was received, and Friend's grand jury testimony was also heard. This evidence, which could not have been received but for the joinder, was essentially the only evidence to support a basic prosecution agreement on the mens rea issue, namely, that the defendants never intended to develop Rio Rancho (Oberman), and that Rio Rancho could not be developed for years in any event (Friend). These arguments were basic to the prosecution's claim of bad faith in the sale of Rio Rancho land as a good financial investment.

Now that the record is complete, it is impossible to understand upon what evidence Oberman and Friend were named and joined as defendants. One obvious purpose was to get their otherwise inadmissible declarations before the jury. See quotation from United States v. Branker, supra.

POINT II

A NEW TRIAL SHOULD BE ORDERED FOR DANIEL FRIEDMAN

There was no evidence that Daniel Friedman knew or had reason to believe that the representations of northwest growth were false. The only evidence of falsity consisted of the Avellanet Report and the various Albuquerque Planning Reports. There was no evidence connecting Daniel Friedman with any of these documents or their contents.

Since the jury verdict was general, this insufficiency with regard to one of the two alleged fraudulent representations requires a new trial for Daniel Friedman. United States v. Natelli, 527 F.2d 311 (2d Cir. 1975).

POINT III

THE INDICTMENT SHOULD BE DISMISSED AS TO ALL DEFENDANTS, ALTERNATIVELY, A NEW TRIAL SHOULD BE ORDERED OF ALL DEFENDANTS SINCE THE PROSECUTION FAILED TO PROVE FALSITY OR BAD FAITH IN THE REPRESENTATION THAT RIO RANCHO LAND WAS A GOOD FINANCIAL INVESTMENT

The indictment should be dismissed for the reasons already argued during the trial, and for the reasons advanced in the new motion by Mr. Arkin's firm, which we adopt.

The prosecution failed to prove that either of the allegedly fraudulent representations were false or made in bad faith. The indictment therefore should be dismissed.

As the least, a new trial should be ordered since the prosecution failed to prove the falsity or bad faith of good investment representation. United States v. Natelli, supra.

The only evidence which the prosecution offered to support its contention of falsity was evidence that a present ready resale market did not exist for Rio Rancho land during the years immediately prior to the filing of the indictment. The absence of a present ready resale market during that time is insufficient to establish that Rio Rancho land is not a good financial investment, especially in view of undisputed evidence that the inherent intrinsic value of Rio Rancho land had increased substantially up to

the filing of the indictment.

There was absolutely no evidence to establish that the defendants acted in bad faith in representing that an investment in Rio Rancho land was a good financial investment. While there was evidence that the defendants knew that a ready resale market did not exist, surely that evidence was not sufficient to establish bad faith in this regard beyond a reasonable doubt.

It is undisputed that the State of New York itself did not believe that the absence of a ready resale market was inconsistent with a representation that Rio Rancho land was a good financial investment. Beginning in 1969, when the State of New York knew that Rio Rancho land was being sold as a good financial investment, the State of New York approved property reports containing a resale disclaimer. If the absence of a ready resale market meant that the land could not be a good investment, then the State of New York obviously could not have permitted the use of the good investment theme as an inducement, while at the same time recognizing and approving the resale disclaimer contained in the property reports. The State of New Jersey took the same position as early as 1966.

This is not a question of State approval or disapproval. The fact is that New York and New Jersey allowed the investment representation in the face of a contemporaneous disclaimer of a ready resale market. If nothing

else, this undisputed evidence negates any bad faith on defendants' part based simply upon their knowledge that ready resale was not available. If the States allowed an investment theme in the face of no resale market, then surely the defendants were entitled to believe that the absence of a ready resale market did not negate their belief in the financial potential of an investment in Rio Rancho land. Yet knowledge of no resale market was the only evidence offered by the prosecution to prove the defendants' bad faith in this regard.

CONCLUSION

The indictment should be dismissed. Alternatively, a new trial should be ordered.

Dated: New York, New York
March 4, 1977

Respectfully submitted,

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PETER FLEMING JR.
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ELIOT LAUER

Of Counsel

EXH. A

A 96080

EVIDENCE NOT CONNECTED
WITH ANY ONE OF THE
FOUR INDIVIDUAL DEFENDANTS

HAMPE

156-158	Exhibit 167E - L.J. Lee Associates' allocation sheet, itemizing the expected profit on lots sold.

HENRY

268	On basis of what she was told at Rio she thought her lots would be developed in 3-5 years.
273-274, 278, 283, 311	Salesman at Rio told her about eventual resale sale; told same at subsequent dinners.
278-279	She was shown sheets by salesmen at dinner showing the financial status and increase of her lots.
283	Mrs. Goff told her Unit 10 would be developed soon (3-5 years).
298-299	She thought Unit 17 would be developed in 10 years based on what she had been told by Bob Berg.
311, 493	Told at Rio that they had to exchange 1/4 acre lot and pay the premium. . . "It was their policy"
420	Told at Rio that prices to build home had doubled over two years.
460	Goff told her kids to buy Unit 2 as they would take longer to mature than the investment of the parents; also told that her investment would triple in 15 to 20 years.

A 9608P

MANDEL

697-700	#315 - Koniecki script (used only four months and different)
734-737	Mandel asked several offices to tape their presentations. He listened to the tapes. To his knowledge no one else reviewed the tapes. Carity listened to one tape that Mandel himself had made at a sales meeting.
742	#671A #671B (BTG Tape)

BONDY

1273-1276	Holds were called by salesmen before there was any indication of interest on the part of the customers. This was part of the training.
1283-1285, 1296-1297	He discusses the technique of representing to customers that they were special clients, and were being offered special land.
1292	Customers were told that in the future there would be a resale office.
1304-1305	As a tour guide he was instructed by Peter Miller to screen the bad apples.
1312-1313	He discusses the practice on ATC Tours of segregating the various types of customers into separate buses to keep the most enthusiastic group and the more likely to purchase additional land group together.
1317-1318	Discusses ATC V.I.P. program of offering "special property".
1332	Bondy had a conversation with Len Geller about buying land and Len Geller discouraged him.

A 9608 Q

SEDER

1393	Speaker said "in a short while you can double your money in real estate.
1394-1396	When holds were called the sales-lady said that that meant the land had been sold.
1398-1399	Was told of resale office.
1399	Was told at Rio that in 5-6 years
1400-1401	it would all be completed. Was told at Rio that he could not get his money back, so kept the property.
1408-1410	Miller said that he could not get his money back.
1429	Was told that there would be utilities on his lot in a few years.

FINNEN

1471-1472	Was told that RRE would be sold out in three years -- this was said by the speaker on the stage.
1479	Salesmen said that Ranchette was better investment than Unit 2 because it was closer to the road.
1482	Told Ranchette has exchange privilege like Unit 2.
1594-1496	Roth Realty said RRE had resale office and they took his name for a list for resale -- he was told that they had a buyer, but he declined because he would have lost too much money on the deal.

GREENBERG

1574	Stasewitz said with regard to commercial and multi-dwelling lot that she should never sell it without first speaking to him because it was so valuable.

A 9608R

1586-1590-1591	Stasewitz told her that these were "luxury housing lots".
1587	Stasewitz told her at the time she attempted to exercise her five year property exchange that she could only transfer one of the three lots she owned.
1607	#1310C - Letter from Geller saying that people will have to come to you after we have sold out.
1608	Contacted the company and told them she had contacted 75 brokers without success.
1627	Told at dinners in 1966 and 1968 that there was not much land left. This was not mentioned in 1971. On cross-examination she says that Stasewitz told her this. (p. 1630).

JONES

1674	Stasewitz said "almost sold out -- will have resale program and sell your lots".
1685	Believed that 80-90% were sold out based on what Stasewitz said.

LEDERMAN

1769-1770	Geller & Miller directed them to place the property reports under the literature.
1793-1794	Discusses the practice of second holds.
1797-1799	Discusses the practice of salesmen making false statements to make the sale, i.e., the unique nature of a particular piece of property.

A 96085

1813-1818	Discusses the practice of selling "special property" at HSO dinner which often meant simply that the land was not offered during the week.
1820	Discusses the technique of not listing commercial property on the allocation sheets and that the Manager would keep a list of such commercial property in his pocket.
1828-1832	Told by Geller & Miller to say that we would be sold out in a year or two and then we will have a resale office. This was stopped after the acquisition.

MASONE

1954-1959	Home-Sit Program was not reduced to writing. Masone reviewed and spoke to Geller and trained the Home-Sit salesmen. Told people return of increase at Rio was 20-25% a year. Also told them that Rio was 85% sold out and that it would open a resale office.
1964-1969	Was instructed not to place property reports on tables and they were not put on table on a general practice.
1969-1972	Occasionally, at a later period, reports were put on the tables but they were hidden pursuant to instruction given the salesmen by the team managers.
1977-1980	The practice before receipts were required was not to put property reports on table.
1981	Before receipts were required people initialed the contracts, although they did not receive reports.
1982-1983	Two holds could be called on the same lot.

1983-1984	He was instructed to seat HSO at closing table with back towards door so they could not see people leaving.
1989	Recounts the speech Miller would give regarding the opening of a resale office.
1987	Segregation of "classes" into different buses.
1998	Tour stayed downtown -- we did not want them on the property. (On 2027 the Court struck that part of this testimony regarding why they stayed downtown).
2003-2006	Was instructed to discourage people from renting cars.
2008	Geller instructed them to buy up the newspapers.

DEWITT

2084	Saleswoman said she owned a great deal of property and was buying it as fast as she could.
2099	Geller told her utilities were being put all over Rio Rancho.
2100	Geller said her part of Unit 25 was going to be the Scarsdale of Rio.

MONACO

2166-2168	Main inducement in training was sale for investment - "appeal to greed" of people per Peter Miller.
2172-2174	Predetermination of holds.
2182-2183	Told Told pilot not to show Rio Rancho from the air.

A 96084

2192-2196	Practice of having best prospect tour property first.
2199-2200	Told people we are at the "end of the road" -- almost sold out.
2204-2205	People told of "special" land not available in New York.

POTTER

2303	Rio received inquiries regarding resale.
2303, 2304, 2306, 2320	Salespeople under Potter and at his direction and Potter personally spoke of resale after the 55,000 acres were sold.
2316	With ATC tours before we would allow cancellation by HSO we turned the HSO over to Miller or Geller.
2328	Rio policy to discourage full acre exchange.
2328	Ex. 905 -- 1970 memo from Hood to Rounds saying that Unit 7 should be shown as the even exchange area.
2338-2340	Ex. 893A -- October 29, 1971 memo from Maryanne Newman to Hood with a copy to Cummings. This is regarding a demand by Smallwood for an even transfer - document says the only available area is Corrales Heights.

BRINDLE

2376	Salesman said initials were just a technicality.

DAVIS

2402, 2404, 2425	Salesman said his multiple dwelling lots were next to be developed.

MOHAMMED

2446	Told at dinner that her lot was on the golf course.
2450-2451	Was told that initials were for the literature.

FINNERTY

2485-2486, 2490	Told by salesman in 1974 that land was good investment, increasing in value.
2493, 2495	Told at Rio that it was a good investment.

BONAVISA

2495	Speaker said the land would be worth a lot of money in a few years.
2603	Saleswoman said the commercial/ multi-dwelling lot would double soon.
2606	Told by salesman at Rio that her lot would be developed in 7 years.
2609-2610	She exchanged her lots because Rio salesmen said a new highway was coming in. Also told that when she sells it she will sell it at a good profit.
2617-2618	Geller tried to sell her "special" property - "just for us".

FOX

2665-2666	Told by manager that he could not show contract to his lawyer.

SWIFT

2743-2745	Told at Rio to buy checkerboard as someone in middle might want full acre.

A 9608 ω

2745	Told at Albuquerque by Rio Rancho people that she could not have animals on the ranchette and therefore switched to ten half-acre lots.
2746	Told at Rio that soon a resale office would be opened.

LINDA DAVIS

2809	Miller did not want his ATC tours to stay at the Panorama Inn. Solomon of Chicago also insisted on downtown hotels.
2811-2815	She draws the route that the tours took on a street map marked as Exhibit 1402. Bob Berg told them to take them on the East side of the river and never take Coors Boulevard.
2822	Property manager told tours that land was almost sold out - resale office would be open soon - property manager discussed what the earlier prices had been.

MILLER

2847, 2850	Told by Wall not to mention size of Rio Rancho as it was too big for people to understand.
2853-2856	New York tours differed from tours from rest of the country. New York broker ran the show. New York tours involved daily combat meetings... discussed buying of newspapers.
2857	Was told to bring any HSO wanting a rental car to Len Geller.
2857-2858	Peter Miller told them about the resale office that would be opened.
2859-2860	Customers who cancelled were segregated.

A 9608 X

2861-2862	Special land set aside for New York tour - at least this is what Miller and Geller told the customers.
2898	Geller told her that C/H was the only area of exchange.

McCORKLE

2917-2918	OPC looked for tourists not locals... locals were discouraged.
2924-2925	Did not mention that there would be a sales presentation -- she was told not to mention RRE.
2926-2928 2938-2939	Told no preachers, etc.
2943-2945	Described Rio as a tiny place.
2946-2947	OPC salesman at meetings discussed calling holds before the actual dinner - they took particular lots for their own exclusive use that particular day.
2948-2949	Salesman told never to let a contract out of the room unless it was a signed contract.
2953	OPC salesmen told to tell HSO it does not matter where your land is as you are buying it as an investment... salesmen told to show any lot if they could not find the particular lot the person bought.
2959-2961	She discusses the failure of the local mail-out program.
2963	Discusses the fact that an ordinance was passed against OPC solicitation.
2968-2970	Later in 1971, the salesmen began using more pressure.

A 9608 Y

2972-2974	Irving Roth told them to use arrowheads.
2979	She complained to Roth about the insults being made to customers. Roth said that's too bad.
3006-3008	She spoke with her superior about the fact that she knew certain so-called "reserve" lands were really available for sale. Hodgins said do not worry as we are really selling a dream not land.

A 9608 Z

JAMES

3567	Development within five-ten years.
3569	Salesman at dinner said there were underground utilities.
3580-3586	Saw hundreds of complaints each day - regarding resale representations, etc. going all the way back to 1962.
3612-3613, 3650-3653, 3679-3680	Thousands of complaints received by her over the telephone - complaining about their inability to resell - other girls received equal number of complaints.
3617-3620	She was told regarding requests for refunds that if it is an ATC account the matter should be referred to Monaco or Massone. If not, no refund was made. She gave the example of the poor welfare woman who did not get a refund. Whelan's response "we're not running a welfare agency here".

MOLS

3694-3695	Salesman at dinner said he personally had commercial lot and they were going to build a gas station there next year.
3721-3724	Exchanged into C/H; Rio salesman told him there were no more lots in Unit 11 - you have to go to C/H and he had to pay the premium. He was told pay the premium or wait until something comes up.
3777	Was told at dinners that land goes up triple, triple up all the time.
3778-3779	In 1967, Sommerhalder told him RRE would be developed in twenty years.

A 9608 AA

GUSOWSKY

3790	Told at dinner that ranchettes were few and therefore good investments.
3791, 3869-3870	Told at dinner that land was almost sold out and that they would have a reselling program within five years.
3875	Told he could not serve on Water Rate Commission because his name appeared in the indictment.

CARRUTHERS

4316	Exhibit 41 was distributed to builders in the Albuquerque area.
4351-4352	Kaufmann represents to the jury that Exhibit 60, 60A and 60B were in the possession of RRE and AMREP. Court says they are admitted solely against the two corporations and are admitted subject to connection.
4357-4358	Kaufmann reads from Exhibit 315. . . City planners give a lot of attention to Rio. . . Carruthers says that is not true.
4362, 4372-74	Fleming asks for mistrial. Judge criticizes Government for their representation that the scripts were supposed to be the same. On page 4380 the Court lets the testimony in to "show the intent of these defendants indevising a scheme".

AVELLANET

4660-4670 4658	Meeting with Rio representatives in December of 1965 - present: Oberman, Sommerhalder and Walsh. Exhibit 978 is a letter to Rio Rancho - discussed trend to Northeast. Oberman said 95% do not come. Oberman used Rainbow as an example. One of the things discussed was that they were told they should not expect a change in present growth patterns.

A 9608 BB

4870	Rio Rancho personnel told him that the national market was primarily lower middle income.
4880	Rio had no intention of developing the full 55,000 acres.
4643, 4649	Avellanet had discussions with Walsh and Sommerhalder.
4650, 4651, 4657, 4658	Walsh and Sommerhalder said that the trend of growth was to the East and Northeast. They all talked of vacancies at Paradise Hills.

MUSGROVE

4957-4963	Someone called him up about making the film. He was told the purpose was to pass State real estate laws. He was given a script to read. He objected to saying "the only way it could grow was West" and they compromised.

KAUFMAN

5165	Salesman at dinner said that he owned an adjacent lot and together the lots would be more valuable and more saleable.

SPORZYNSKI

5332	Told several times at dinner parties that the company would soon have a resale office.
5336	Exhibit 129J is a letter he received from Rio Rancho. This is a letter from Paul Heinz while he was still a Rio Rancho employee. It implies the possibility of a future resale program.

5332-5335	Exhibit 129L is a letter (not form) to Sprozynski "we have not yet formed a Resale Department".
5421-5422	Exhibit 872 - (except paragraph 4) This is a memo from Maryann Newman to files - re: HSO being told that we were almost sold out.
5431	Exhibit 657 - this is an internal memo from Colegrove to Lurie re: the Albuquerque home sales market.
5451	Exhibit 586 - paragraph 13 (only the first sentence) "I worked with Miller on ATC scripts" (SHF to HWF).
MORDEN	
5510	Told at dinner by saleslady that any time he wants to resell we will help you resell.
551[illegible]	Told at Rio that in three to four years his lot will be developed.
5516	Was told at Rio that in five to six years a shopping center will be near his lot.
GRAY	
5645, 5651, 5687-5688	Told at dinner that if he ever wants to resell they will buy it back.
5648	Rio salesman said he did not know if there was any land still left - the salesman called in to the office and they said there are one or two pieces left for sale.

A 9608 DD

REYES-GUERRA

5720-21, 5742-44	Was told that utilities will be in within a few years.
5725-5726	Complained on a later trip to Rio salesman regarding the above representation and they told him he could exchange his lot but he would have to pay a premium.
5773-5774	Salesman at Rio said there would be a country club and shopping center near his lot.
5796-5800	Sol Friend's grand jury testimony, Exhibit 201 - read to jury. Court said it is not admitted against the corporations or against the individuals. (Friend's grand jury testimony is in the transcript on page 5800-5821).

COPY RECEIVED
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MAY 5 1977
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SO. DIST. OF N.Y.